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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

RESIDENTIAL CAPITAL, LLC, et al.

Debtors.

)
) Chapter 11
)
) Case No. 12-12020 (MG)
)
) Jointly Administered
)

**REPLY OF ALLY FINANCIAL INC.
AND ALLY BANK IN SUPPORT OF MOTION
BY ALLY FINANCIAL INC. AND ALLY BANK
FOR AN ORDER ENFORCING THE AUTOMATIC
STAY PURSUANT TO 11 U.S.C. § 362(a)(3) BY (1) ENJOINING
PROSECUTION OF ALTER EGO AND VEIL PIERCING CLAIMS
IN THE CLASS ACTION ENTITLED *LANDON ROTHSTEIN, ET AL. V. GMAC
MORTGAGE, LLC, ET AL.*, AND (2) DECLARING SUCH CLAIMS VOID *AB INITIO***

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TO THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE:

Ally Financial Inc. (“**AFI**”) and Ally Bank (together, “**Ally**”) submit this Reply in further support of the *Motion by Ally Financial Inc. and Ally Bank for an Order Enforcing the Automatic Stay Pursuant to 11 U.S.C. § 362(A)(3) by (1) Enjoining Prosecution of Alter Ego and Veil Piercing Claims in the Class Action Entitled Landon Rothstein, et al. v. GMAC Mortgage, LLC, et al., and (2) Declaring Such Claims Void Ab Initio* [ECF No. 2511] (the “**Motion**”).¹

PRELIMINARY STATEMENT

1. Rather than supporting their position, Plaintiffs’ Objection to the Motion [ECF No. 3343] (the “**Objection**”) highlights the need to enforce or extend the automatic stay² to enjoin prosecution of the Class Action against Ally, by confirming that Plaintiffs’ claims and the damages Plaintiffs seek in the Class Action are entirely dependent upon the underlying conduct of GMACM. Indeed, Plaintiffs filed their Proofs of Claim against GMACM and ResCap which merely attach and incorporate their original Complaint and the Amended Complaint in the Class Action (Haddad Decl., ECF No. 2512, Exs. C and D). Thus, the only way Plaintiffs can prove their claims in the Class Action is by proving the underlying conduct of GMACM. Not only are Plaintiffs’ claims in the Class Action identical to the claims asserted in the Proofs of Claim, but those claims undeniably overlap with the Debtors’ claims against Ally that are the subject of the Examiner’s investigation and that will be addressed in any chapter 11 plan.

2. While Ally believes that Plaintiffs’ veil-piercing and alter-ego claims asserted in the Class Action are utterly without merit and is prepared to litigate such claims to judgment,

¹ Capitalized terms used herein without definition have the meanings set forth in the Motion.

² In its Response to the Motion [ECF No. 3345] (the “**Committee Response**”), the Creditors’ Committee (the “**Committee**”) asserts that, regardless of the merits of the Motion, Plaintiffs should be enjoined under section 105 of the Bankruptcy Code from prosecuting the Class Action because prosecution will have a disruptive effect on prosecution of the Debtors’ claims and threaten multilateral chapter 11 plan negotiations.

these claims should not be litigated piecemeal. This is because this Court, and this Court alone, should decide whether an action is owned by the estates – a point that Plaintiffs do not dispute. The Class Action falls within that category and, as a result, is protected by the automatic stay.

3. Moreover, it is important for the Court to recognize that the Motion could have significant implications in these chapter 11 cases. Permitting the Class Action to proceed could spur additional lawsuits by creditors seeking to prosecute the Debtors' veil-piercing and alter-ego claims against Ally under similar unsubstantiated allegations of particularized injury thereby undermining the Debtors' ability to resolve such claims against Ally in these cases and the Court's authority to determine whether such actions involve estate property. There is zero question that the estates would be harmed by allowing the Class Action to proceed and creating such a result, thereby stripping the estates of property and exposing the estates to decisions by other courts with respect to veil-piercing and alter-ego claims against Ally.

4. Each of the arguments that Plaintiffs make in the Objection should be rejected, and the automatic stay should be enforced or extended so as to enjoin prosecution of the Class Action against Ally. As demonstrated below, the automatic stay prohibits continued prosecution of Plaintiffs' veil-piercing and alter-ego claims in the Class Action and, in the alternative, cause exists to extend the stay to cover all of the claims asserted against Ally in the Class Action. Additionally, Plaintiffs' assertion that Ally lacks standing to bring this Motion is moot and otherwise incorrect. Lastly, the Plaintiffs' request to lift the automatic stay to prosecute the Class Action has not been properly noticed and in any case should be denied for the same reasons as the Court should enforce the stay. Accordingly, the Court should grant the Motion and enjoin continued prosecution of the Class Action against Ally.³

³ Ally believes the Court can decide the Motion based upon the pleadings in the Class Action and the Proofs of Claim. To the extent the Court determines that a separate evidentiary hearing is necessary, Ally respectfully

REPLY

A. Plaintiffs' Claims Against Ally Are Property of the Debtors' Estates.

5. Plaintiffs do not dispute that this Court, and this Court alone, should determine whether Plaintiffs' alter-ego, veil-piercing, and related claims in the Class Action are property of the Debtors' estates. Instead, in the Objection, Plaintiffs argue that their veil-piercing and alter-ego claims in the Class Action are not property of the Debtors' estates because such claims are based on allegations of "particularized," rather than "generalized," injury. (Objection ¶ 31) That contention is without merit.

6. Plaintiffs concede that "some of Plaintiffs' alter-ego and veil-piercing allegations involve 'generalized' injury and conceivably could support claims brought by other creditors" (Objection, ¶ 36), and a review of the Second Amended Complaint ("**SAC**," ECF No. 3343-3) confirms that Plaintiffs' veil-piercing allegations are, in fact, the very type of generalized claims that belong exclusively to the Debtors' estates. *See, e.g.*, SAC ¶ 13 (alleging that AFI "exercised complete domination and control over the affairs, activities, and operations of its subsidiaries including, specifically, those of ResCap and GMACM such that those subsidiaries operated as mere instrumentalities or alter-egos of [AFI]," and AFI is "vicariously liable for GMACM's misconduct"); SAC ¶ 149 ("Ally Financial consolidated and held out its residential mortgage loan origination, acquisition, distribution, servicing, and securitization businesses under the ResCap banner as a single integrated corporate enterprise.").

7. Many of the veil-piercing allegations that Plaintiffs claim show that they suffered "particularized" injury actually demonstrate that they did not, because any creditor could make such allegations. For example, Plaintiffs claim that AFI "use[d] GMACM as a corporate shell to

requests that the Court permit the parties to conduct limited discovery and agree upon an additional briefing schedule given the importance of the issues raised by the Motion to the Debtors and their creditors.

unjustly shield itself from liability”; that “[t]he day-to-day business operations of . . . GMACM were run at the direction of and controlled by Ally Financial . . . ”; and that AFI “‘controlled’ the mortgage servicing activities of GMACM and ‘caused GMACM to engage in the misconduct alleged . . . ’” (Objection, ¶ 33) Ally disputes these bald and unsubstantiated allegations—but the point here is that any creditor could plead them. Thus, they do not show “particularized” injury.

8. Plaintiffs also rely on several cases which they claim stand for the proposition that a veil-piercing claim is personal to a creditor when the defendant has injured the creditor itself rather than the corporation. *See, e.g., Mannucci v. Cabrini Med. Ctr. (In re Cabrini Medical Center)*, 2012 WL 6629103, at *6 (S.D.N.Y. Dec. 20, 2012); *Variable Parameter Fixture Corp. v. Morpheus Lights, Inc.*, 945 F. Supp. 603, 607-08 (S.D.N.Y. 1996). Plaintiffs then claim, based upon carefully worded assertions, that “Ally Financial directly and actively participated in the violations while using GMACM as a corporate shell to unjustly shield itself from liability” and “‘controlled’ the mortgage servicing activities of GMACM,” and that the SAC therefore alleges particularized injury. (Objection, ¶ 12) However, these assertions, and the related allegations in the SAC, are conclusory and therefore cannot support a veil-piercing claim against AFI, let alone one that is personal to Plaintiffs. *See, e.g., Robles v. Copstat Sec., Inc.*, 2009 U.S. Dist. LEXIS 112003, at *7 (S.D.N.Y. Dec. 2, 2009) (“Mere conclusory statements that a corporation is dominated or controlled by [a parent owner] are insufficient to pierce the corporate veil”); *FDIC v. CoreLogic Valuation Servs., LLC*, 2011 WL 5554324 at *10 (C.D. Cal. Nov. 14, 2011) (plaintiff failed to adequately allege alter ego liability where it simply “‘aver[red] in conclusory language that CoreLogic, First American Information Services, and First American Solutions directed and controlled EA’s actions with regard to the appraisal services provided by EA to WaMu”); *Youkelsone v. Wash. Mut., Inc. (In re Wash. Mut., Inc.)*, 2010 WL 3238903 at *13

(Bankr. D. Del. Aug. 13, 2010) (conclusory allegations that the holding company “‘controlled, supervised, directed, and completely dominated all of the Bank's financial operations, Bank’s policies and business practices in respect to all transactions generated by the Bank’” and “‘completely directed, managed and controlled’ the business affairs of the Bank” insufficient to support alter ego claim).

9. The only support Plaintiffs give for their conclusory assertion that AFI “directly and actively engaged in violations,” is an innocuous allegation in the SAC that funds were transferred through “AFI’s ‘global cash management system.’” (Objection, ¶ 30) The mere existence of a centralized cash management system established by a parent corporation for a consolidated group is insufficient to support an alter ego claim, *see, e.g., Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995) (“Courts have generally declined to find alter ego liability based on a parent corporation’s use of a cash management system.”); *United States v. Bliss*, 108 F.R.D. 127, 132 (E.D. Mo. 1985) (cash management system indicative of the “usual parent-subsidary relationship”), let alone a direct, plenary claim against AFI. In fact, if the flow of funds through the AFI global cash management system were sufficient to support Plaintiffs’ assertion that an alter ego claim is “personal” to them, then **any** veil-piercing claim against AFI by any creditor would be “personal” to that creditor.

10. Plaintiffs also rely on the unremarkable fact that AFI made statements in a consent order and a settlement agreement with governmental entities in which they claim that AFI agreed to oversee its subsidiaries’ compliance with those agreements. (Objection, ¶ 34) Those agreements cannot possibly create a claim on behalf of Plaintiffs or show any injury (let alone particularized injury) to Plaintiffs, because they were entered into **after** Plaintiffs were

allegedly charged for the lender-placed insurance (“LPI”) at issue in the Class Action. Nor do the unremarkable statements in Ally’s financial statements support Plaintiffs’ claims.

11. Lastly, Plaintiffs argue that they do not assert alter-ego or veil-piercing claims against Ally Bank, much less generalized claims and instead assert claims against Ally Bank for agency liability and contract liability. (Objection, ¶ 21). Plaintiffs, however, should not be permitted to dress up their alter-ego and veil-piercing claims as purported other causes of action to avoid such claims being recognized as property of the Debtors’ estates. Based upon the SAC and the procedural history of the Class Action, Ally believes that Plaintiffs filed the Class Action only because they are unable to pursue the Debtors for a meaningful recovery and that Plaintiffs’ claims, no matter how they are labeled, are essentially grounded upon veil-piercing and alter-ego theories. Tellingly, the SAC fails to allege any misconduct by Ally Bank despite Plaintiffs’ assertion that their claims against Ally Bank “rest on Ally Bank’s own breaches of duty.” (Objection, ¶ 22)

12. Accordingly, the SAC does not support a claim that Plaintiffs sustained “particularized” injury, and the veil-piercing and alter-ego claims they assert are, therefore, property of the Debtors’ estates and can only be properly asserted by the Debtors, not Plaintiffs.

B. In the Alternative, the Court Should Extend the Automatic Stay Pursuant to Section 105 of the Bankruptcy Code to Enjoin Prosecution of the Class Action Against Ally.

13. Section 105(a) of the Bankruptcy Code authorizes the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11],” and gives this Court broad powers to extend section 362 of the Bankruptcy Code and enjoin actions against non-debtors. Hearing Tr. at 127, *In re Residential Capital, LLC*, No. 12-12020 (MG) (ECF No. 750) (July 10, 2012) (“Courts find the power to extend the automatic stay to

nondebtors in Section 105 of the Bankruptcy Code.”).⁴ “Courts have consistently found that section 105 may be used to stay actions against non-debtors even where section 362 otherwise would not provide such relief.” *Nevada Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 409 n.20 (S.D.N.Y. 2007). “All a bankruptcy court must find to enjoin a claim against a non-debtor under section 105(a) was that the claim would threaten to ‘thwart or frustrate the debtor’s reorganization efforts and that the injunction is important for reorganization.’” Hearing Tr. at 128, *In re Residential Capital, LLC*, No. 12-12020 (MG) (ECF No. 750) (July 10, 2012).

14. To the extent the Court does not determine that Plaintiffs’ claims are property of the Debtors’ estates, Ally joins in the Committee’s request that the automatic stay be extended to enjoin prosecution of the Class Action for the reasons set forth in the Committee Response, and notes further that the Debtors would bear a massive burden with respect to discovery in the Class Action if it were to go forward in addition to being exposed to potentially prejudicial rulings by other courts.⁵

C. Plaintiffs’ Standing Argument Is Moot and Otherwise Incorrect.

15. Plaintiffs claim that Ally lacks standing to file the Motion. Before filing the Motion, Ally coordinated with the Debtors with respect to the relief requested, and the Debtors subsequently joined the Motion. (*See* ECF. No. 2834). Accordingly, Plaintiffs’ standing argument is moot. Even if the Debtors had not joined the Motion, Ally submits that it had standing to file the Motion. Courts have held that lawsuits brought in violation of the automatic

⁴ An excerpt of the July 10, 2012 hearing transcript is annexed hereto as **Exhibit A**.

⁵ At a minimum, the discovery required from the Debtors would include document productions and electronic discovery, including voluminous mortgage loan files and e-mails and other communications between GMACM and borrowers and other defendants as well as depositions of present and former personnel. The Amended Complaint includes allegations going back at least to March 2003, and asserts claims on behalf of “a nationwide putative class consisting of residential mortgage borrowers who have been charged for . . . LPI . . . in connection with loans serviced by . . . GMACM . . . at any time from March 6, 2003 to the present.” (SAC ¶¶ 1, 5, 6.)

stay are void and without legal effect. *See, e.g., In re Best Payphones, Inc.*, 279 B.R. 92, 97 (Bankr. S.D.N.Y. 2002) (“Any proceedings or actions described in section 362(a)(1) of the Bankruptcy Code are void and without vitality if they occur after the automatic stay takes effect.”) (quoting *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 526 (2d Cir. 1994)). Ally should not have to expend significant time and resources defending itself in litigation that has no legal effect. Moreover, under section 1109(b) of the Bankruptcy Code, Ally is a party interest under the Bankruptcy Code and has a right to heard on any issues in the Debtors’ chapter 11 cases, including the Motion. *See* 11 U.S.C. § 1109(b). The Motion is not a tactic to avoid litigation, and instead is intended to ensure that such litigation is handled in the proper forum by the proper parties.

D. The Court Should Not Lift the Automatic Stay of the Class Action.

16. There is no basis for Plaintiffs’ request that the Court lift the automatic stay to permit Plaintiffs to prosecute their claims against Ally. As a threshold matter, Ally does not believe that Plaintiffs’ request is properly before the Court insofar as Plaintiffs have never separately noticed their purported “cross motion” for stay relief. Nonetheless, Plaintiffs have failed to carry their burden to establish relief from the stay. *See In re Residential Capital, LLC*, 2012 WL 3555584, at *2 (Bankr. S.D.N.Y. Aug. 16, 2012) (“The moving party bears the initial burden to demonstrate that ‘cause’ exists to lift the stay.”) (citing *Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1286 (2d Cir. 1990)). Moreover, “[t]he general rule is that claims [such as those here] that are not viewed as secured in the context of § 362(d)(1) should not be granted relief from the stay unless extraordinary circumstances are established to justify such relief.” *In re Residential Capital, LLC*, 2012 WL 3555584, at *2 (quoting *In re Leibowitz*, 147 B.R. 341, 345 (Bankr. S.D.N.Y. 1992)).

17. Specifically, contrary to Plaintiffs' assertions, the relevant *Sonnax* factors weigh against lifting the stay for the reasons already set forth above justifying enforcement and, in the alternative, extension of the automatic stay and for the reasons set forth below:

- **Factors Nos. 1 and 11:** Even if the stay is lifted to permit the prosecution of the Class Action against Ally, any potential veil-piercing and alter-ego claims of the Debtors and Plaintiffs' Proofs of Claim will still need to be addressed in the Debtors' bankruptcy cases. Thus, lifting the stay will only result in a partial resolution of the issues, not to mention that class actions typically require years to adjudicate. The first and eleventh factors thus weigh against lifting the stay. *See, e.g., In re Residential Capital, LLC*, 2012 WL 3555584, at *3 ("While relief may eventually result in partial or complete resolution of the issue at hand, the resolution may not be immediate. The [Class Action] is in its early stages. Discovery, trial preparation and, absent a settlement, trial all remain to be done. Therefore, the first and eleventh *Sonnax* Factors weigh against lifting the stay.").
- **Factor No. 2:** The claims in the Class Action are directly connected with these bankruptcy cases and prosecution of the Class Action will interfere with the proceedings in the bankruptcy case. Plaintiffs' veil-piercing and alter-ego claims are generalized claims owned by the Debtors' estates. The Committee has sought standing to assert these claims on behalf of the Debtors and their creditors. And, Plaintiffs have filed Proofs of Claim based upon the very same wrongful conduct and seeking the very same damages as they seek from Ally in the Class Action. Not only would the Class Action overlap with matters in these cases, but its prosecution would interfere with the potential resolution of the Debtors' claims under a chapter 11 plan and would subject the Debtors to burdensome discovery and potential adverse rulings. *See, e.g., In re Residential Capital, LLC*, 2012 WL 3555584, at *7. Accordingly, the second *Sonnax* factor strongly weighs against lifting the stay.
- **Factor No. 4:** This Court is the appropriate court to address all veil-piercing and alter-ego claims against Ally. This Court is "a specialized tribunal with the necessary expertise ... to hear the cause of action," and this factor weighs against lifting the stay.
- **Factor No. 5:** To date, no insurer has assumed responsibility for the Class Action. The Debtors would need to pay any expenses in relation to their participation in the Class Action, which would include substantial discovery expenses at a minimum. As a result, the fifth *Sonnax* Factor does not support relief from the stay.
- **Factor No. 7:** Litigation of the Class Action in another forum (here, the District Court) would prejudice the rights of other creditors who are relying on this Court to resolve their veil-piercing and alter-ego claims while Plaintiffs are permitted to prosecute those claims elsewhere. Consequently, this factor also weighs against lifting the stay. *See In re Residential Capital, LLC*, 2012 WL 3555584, at *4 ("It would be unfair to other creditors who must bring their claims in this Court.

[Plaintiff] should be treated as other similarly situated unsecured creditors; doing so also minimizes the risks of inconsistent results.”).

- **Factor No. 10:** The veil-piercing and alter-ego claims against Ally will be addressed in these cases. If Plaintiffs are allowed to proceed on the same claims in the Class Action, similar issues would have to be re-litigated, and witnesses would be inconvenienced with multiple depositions. Thus, the interests of judicial economy and expeditious and economical resolution of litigation weigh against lifting the stay.
- **Factor No. 12:** Plaintiffs’ veil-piercing and damage claims can all be litigated in the Debtors’ bankruptcy cases or resolved under a chapter 11 plan. Consequently, Plaintiffs will not suffer undue prejudice if the stay is not lifted. On the other hand, if the stay is lifted, the Debtors’ ability to resolve their claims against Ally will be hindered, the Debtors will be subjected to massive discovery, and they will be forced to choose between participating in the Class Action and risking that adverse findings and decisions and an adverse record will be generated in the Class Action.

18. Based on the foregoing, the balancing of the harms weighs against lifting the stay.

CONCLUSION

19. For the reasons set forth above, the Objection should be overruled and the Motion should be granted.

New York, New York
Dated: April 30, 2013

/s/ Ray C. Schrock

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EXHIBIT A

Excerpts From July 10, 2012 Hearing Transcript

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Lead Case No. 12-12020-mg Adv. Proc. No. 12-01671-mg

4 - - - - -x

5 In the Matters of:

6 RESIDENTIAL CAPITAL, LLC, et al.,

7 Debtors.

8 - - - - -x

9 RESIDENTIAL CAPITAL, LLC, et al.,

10 Plaintiffs,

11 - against -

12 ALLSTATE INSURANCE COMPANY, et al.,

13 Defendants.

14 - - - - -x

15
16 United States Bankruptcy Court

17 One Bowling Green

18 New York, New York

19
20 July 10, 2012

21 10:07 AM

22
23 B E F O R E:

24 HON. MARTIN GLENN

25 U.S. BANKRUPTCY JUDGE

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12-12020-mg Residential Capital, LLC Ch. 11

Adversary proceeding: 12-01671-mg Residential Capital, LLC et
al v. Allstate Insurance Company et al.

Doc# 4,13 Evidentiary Hearing RE: Motion for Preliminary
Injunction Notice of Motion and Debtors Motion to Extend
Automatic Stay or, in the Alternative, for Injunctive Relief
Enjoining Prosecution of Certain Pending Litigation Against
Debtors Directors and Officers and Non-Debtor Corporate
Affiliates.

Adversary proceeding: 12-01671-mg Residential Capital, LLC et
al v. Allstate Insurance Company et al
Pre-trial Conference.

12-12020-mg Residential Capital, LLC Ch. 11

(CC: Doc no. 245) Motion for Relief from Stay Authorizing
Debtor(s) To Honor Certain Prepetition Obligations To Movants
filed by Mark and Lori Burris.

(Doc no. 456) Motion for Relief from Stay filed by Yvonne D.
Lewis, Sidney T. Lewis.

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1 counsel, so they can figure out who's going to be cross-
2 examined. And what I would suggest is then when we come -- are
3 there going to be objections to the declarations that have been
4 offered? In other words -- because the first thing I'm going
5 to ask the debtors to do is offer the declarations in evidence.
6 Are there going to be objections to the declarations?

7 Any declaration that is offered in evidence, the
8 declarant has to be available for cross-examination. So these
9 are all coming in, if they come in, subject to cross. But I
10 just want to know, are there objections to the admission in
11 evidence of the declarations?

12 MR. ETKIN: Your Honor, there'll be no objections from
13 us with respect to the factual averments in the declarations.
14 But there may be some issues that I can discuss with counsel.

15 THE COURT: Okay. Anybody else?

16 All right. So we're going to take a recess until
17 11:30. Just confer so you know who's going to be cross-
18 examined. Are the objectors calling any witnesses?

19 MR. ETKIN: We are not, Your Honor.

20 THE COURT: Anybody calling any witnesses on that
21 side?

22 Okay. We're in recess.

23 (Recess from 11:11 a.m. until 11:30 a.m.)

24 THE COURT: Please be seated.

25 MR. HAIMS: Good morning, Your Honor. My name is Joel

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1 Haims of Morrison & Foerster, proposed counsel to the debtors.

2 Your Honor, this is a hearing on the debtors' motion
3 to extend the automatic stay or for an injunction enjoining
4 certain cases filed against nondebtor affiliates. With Your
5 Honor's permission, I'd first like to give an overview of the
6 motion. Then I'd like to briefly walk through the legal and
7 factual bases for the motion. Then I'll proffer our evidence,
8 and then I'll make our declarants available for cross-
9 examination.

10 THE COURT: When you say proffer the evidence, you'll
11 offer the declarations into evidence?

12 MR. HAIMS: Correct. Correct, Your Honor.

13 I'll begin with an overview of the motion. This
14 motion is made pursuant to both Section 362 and Section 105 of
15 the Code. The relief we are seeking is an extension of the
16 automatic stay to affiliates of the debtor in six cases. The
17 debtors resolved this motion with parties representing eighteen
18 of the initial twenty-seven cases, all of whom have agreed to a
19 stay through October 31. Two additional cases were dismissed
20 entirely. And Judge Cote withdrew the reference in the FHFA
21 case yesterday.

22 THE COURT: And I saw the FDIC filed a motion to
23 withdraw the reference last night.

24 MR. HAIMS: Correct. Only six cases remain in issue
25 for the hearing today. It's the FDIC, New Jersey Carpenters

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1 Fund, Union Central, Western & Southern, and two Cambridge
2 Place Investment Management cases.

3 The procedural posture for each case is detailed in
4 the declarations of Mr. Lipps submitted with the motion papers
5 at ECF docket numbers 6 and 59. All of these cases are based
6 on the debtors' issuance of mortgage-backed securities, and are
7 brought by investors in those securities.

8 The affiliates at issue in these cases are the
9 debtors' former directors and officers and four of the debtors'
10 corporate affiliates: Ally Financial, the debtors' ultimate
11 parent; GMAC Mortgage Group, the debtors' immediate parent;
12 Ally Securities; and Ally Bank. For the Court's convenience,
13 an organizational chart is attached as Appendix B to our
14 initial moving papers at ECF docket 4-2.

15 THE COURT: I have that before me.

16 MR. HAIMS: To put these cases in context, the
17 original twenty-seven cases we sought to stay involved more
18 than 660,000 loans with 83 billion dollars in original
19 principal balance. Even just the remaining six cases involve
20 thirty-four separate securitizations with more than 150,000
21 loans and an original principal balance of more than 26 billion
22 dollars.

23 I'll now turn to the legal and factual bases for the
24 motion. To frame the issue, I just want to point out that the
25 relief we are seeking here is well within the Court's

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jurisdiction, is temporally limited through plan confirmation only, and doesn't seek to stop the underlying cases as to any other parties. As I mentioned, the debtors seek an extension of the stay under Section 362.

The basis for the requests are twofold. First, pursuant to Section 362(a)(1), there is such an identity of interests that the actions against the nondebtors would have an adverse impact on the debtors' estates and their efforts to restructure. Second, pursuant to 362(a)(3), the claims against the nondebtor affiliates seek to obtain possession or exercise control over the estates' property.

As set forth in detail in our moving papers, there are four primary reasons why an extension of the stay is warranted under Section 362. First -- and I'll walk through them briefly. First, if these cases continue against the nondebtors, the debtors risk being bound by factual and legal findings that can significantly prejudice their rights in these and other cases. The debtors' alleged conduct, the issuance of mortgage-backed securities, is the foundation for all of the claims against the nondebtor affiliates.

All of the claims, no matter how they are titled, arise out of the offering materials the debtors prepared and in connection with the securitizations --

THE COURT: Let me stop you. Because in the proposed stipulation you presented that settles eighteen of the cases,

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1 you've agreed that the motions to dismiss that are pending in
2 some of those cases, the courts in those cases are going to
3 decide the motions, motions for reconsideration, or whatever
4 can be considered. Why shouldn't any motions to dismiss in the
5 six cases continue and allow the judges to decide those as
6 you've agreed to do in the other -- it doesn't cover all
7 eighteen, but the ones you specifically go through the recitals
8 about where there are motions to dismiss pending?

9 MR. HAIMS: And, Your Honor, we've offered that. So
10 we are okay with anything that -- with allowing anything to go
11 forward that doesn't involve work or the depletion of resources
12 by the debtors. So to the extent that any motion is pending
13 before the Court we've said the Court can go ahead and decide
14 that motion. We've offered that, to the extent --

15 THE COURT: Well, you did more than that. Because it
16 specifically -- the stipulation specifically contemplated
17 motions for reconsideration and things of that nature, which,
18 if they're filed, will require additional work by the nondebtor
19 affiliates, I assume, in making such motions, or opposing
20 motions.

21 MR. HAIMS: To the extent that we offered it to any of
22 those cases, Your Honor, we're okay with it for these cases as
23 well. We want the same terms to everybody.

24 THE COURT: In one of the cases there were -- motions
25 to dismiss were due on July --

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1 MR. HAIMS: 13th.

2 THE COURT: There was one that was due July 6th. Did
3 that get filed? Were the pleadings --

4 MR. HAIMS: July 6th?

5 MR. ETKIN: Your Honor --

6 MR. HAIMS: That's the --

7 MR. ETKIN: -- if I can just try to help. Michael
8 Etkin, Lowenstein Sandler, on behalf of --

9 THE COURT: A lot of clients, yeah.

10 MR. ETKIN: -- the lead plaintiffs, the Union Central
11 plaintiffs, and Cambridge Place Investment.

12 The July 6th date may refer to the discovery cutoff in
13 connection with the class certification issues in the -- that's
14 the only July 6th date that I can re --

15 MR. HAIMS: Yeah --

16 MR. ETKIN: Oh, there was a July 6th date for --

17 MR. HAIMS: -- that was -- I'm sorry.

18 MR. ETKIN: -- for all motion papers to be in on the
19 Cambridge Place cases --

20 THE COURT: That's the date.

21 MR. ETKIN: -- and there's an oral argument scheduled
22 for July 13th.

23 THE COURT: So all oral argument -- all papers were
24 submitted by July 6th?

25 MR. ETKIN: As far as I understand it, all papers have

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1 been submitted, Your Honor.

2 THE COURT: Okay, Thank you.

3 MR. HAIMS: On July 6th? The West --

4 THE COURT: I know I read something --

5 MR. HAIMS: In Western & Southern, there was an answer
6 that was filed on July 6th.

7 THE COURT: Okay.

8 MR. HAIMS: Yes, and that was filed.

9 THE COURT: All right. Go ahead, Mr. Haims.

10 MR. HAIMS: So in these circumstances where there is
11 an identity of interest between the debtors and the nondebtors,
12 the courts in this district, including Your Honor in McHale,
13 have stayed cases against nondebtors.

14 Second, if these cases against the nondebtors are
15 allowed to continue, the debtors will face burdensome and
16 overwhelming discovery. Because the debtors issued the
17 mortgage-backed securities, they have virtually all of the
18 relevant documents. The debtors have the mortgage files, the
19 loan level performance data, the underwriting guidelines, the
20 due diligence materials, the deal documents, and all of the
21 e-mails relating to the deals. To produce these materials in
22 these cases would be extremely expensive, would be a
23 substantial drain on both the debtors' monetary and human
24 resources and tax already overtaxed employees.

25 The witnesses will also be the employees of the

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1 debtors since the debtors have the knowledge of the issues
2 raised in the complaints and the nondebtor affiliates, on the
3 other hand, have few employees, if any, who could speak to any
4 of the issues.

5 The MBIA cases against the debtors, which we discuss
6 at length in our moving papers and in the Lipps declaration,
7 are illustrative of the burdens that the debtors face in these
8 cases. That discovery from the MBIA cases, Your Honor,
9 incidentally, can't be reused in other cases, because each case
10 involves different securitizations, different mortgage loans,
11 different underwriting guidelines, different documents,
12 different witnesses, and different facts.

13 And despite the fact that the cases against the
14 debtors are stayed, plaintiffs in the underlying cases still
15 seek document discovery and documents in the debtors'
16 possession. In fact, as mentioned in our motion papers, the
17 FHFA has asked for permission to move --

18 THE COURT: I guess I don't want to hear about FHFA.
19 They're not before me.

20 MR. HAIMS: Well, I think that's just -- it's an
21 example of what the parties here will face or could face --
22 what the debtors could face if --

23 THE COURT: Judge Cote withdrew the reference with
24 respect to FHFA. That's not before me.

25 MR. HAIMS: The debtors -- the FHFA, like Western &
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1 Southern, which is before you here, have sought loan files
2 which are in debtors' possession --

3 THE COURT: In looking at my notes I see that it was
4 in the Western & Southern action that Ally Securities was to
5 make filings in Ohio on July 6th. Did they do that?

6 MR. HAIMS: They did, Your Honor.

7 And the only reason I raised the FHFA case, and which
8 is similar to the Western & Southern case, because in the
9 absence of the stay here we expect the parties to continue to
10 seek discovery of documents in the debtors' possession from the
11 nondebtor affiliates in those cases, as the FHFA in fact --

12 THE COURT: Let me just --

13 MR. HAIMS: -- has done.

14 THE COURT: We'll get to the discovery issues, but let
15 me -- I see that in the Union Central action, motions to
16 dismiss the amended complaint are due on July 13th. Which of
17 the nondebtor affiliates is the defendant in that action?
18 That's before Judge Daniels, as I understand it?

19 MR. HAIMS: Union Central has Ally Securities, Ally
20 Financial, and one of the individuals.

21 THE COURT: And since I'm not likely to rule from the
22 bench today and so there will be no stay in effect, are those
23 nondebtor affiliates ready to file their motions to dismiss, if
24 they're going to, on July 13th?

25 MR. HAIMS: Your Honor, I'm not counsel in those

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1 cases. My understanding is that there's no stay, and without a
2 stay in those cases the debtors would have to answer the
3 cases --

4 THE COURT: The reason I'm --

5 MR. HAIMS: -- or the nondebtor affiliates have to.

6 THE COURT: The reason I'm pausing on the motions to
7 dismiss, I'm sort of -- I don't know, I haven't heard the
8 evidence and I'm not saying what I'm going to do yet on these
9 motions, but one of the things that strikes me, Mr. Haims, is
10 that looking at the end game in these cases, the debtors at
11 least have stated on the record that they intend to propose a
12 plan that would provide releases to all of the nondebtor
13 affiliates. And that obviously presents legal and factual
14 issues not for today.

15 But at a minimum, if that's going to happen, it's
16 going to require an evaluation of the claims that are proposed
17 to be released. And it does seem to me that central to that
18 effort is whether the claims that have been asserted, whether
19 the complaints that have been filed state claims for relief.
20 And where motions to dismiss have been made or will be made,
21 decisions by the state courts or district courts where those
22 actions are pending would certainly provide pertinent
23 information, relevant information in any evaluation of the
24 claims.

25 So even if I were persuaded to grant an injunction,

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1 which remains to be seen, I would be very reluctant to do that
2 with respect to motions addressed to the pleadings, or even in
3 the cases before Judge Baer where discovery and briefing is
4 concluding on class certification -- it's not merits discovery
5 that most of your arguments are addressed to -- I would be
6 inclined to allow that to go forward. I think the discovery
7 issues are a separate set of issues.

8 Your stipulation in the eighteen matters where you
9 have resolved obviously reflect that you're prepared to have
10 motions addressed and the pleadings go forward. And whether it
11 requires nondebtor affiliates to file new pleadings over the
12 next couple of months or not, I'm not particularly moved by
13 your argument.

14 MR. HAIMS: Thank you, Your Honor. I mean, it is
15 clear, which is clear from the stipulation, that the crux of
16 the request goes to the discovery burden and it goes to the
17 costs that will be incurred to defend those, primarily as it
18 results from the cost of the discovery burden. The discovery
19 burden is massive, and the costs of that will be massive. You
20 know, I can't stay up here and say that briefing a motion to
21 dismiss is going to --

22 THE COURT: Well, putting a label on it that the costs
23 would be massive is a conclusory statement. I hear your
24 argument.

25 MR. HAIMS: And we'll have -- Mr. Lipps will talk in

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1 more detail about that later.

2 Your Honor, the debtors also have contractual
3 indemnity obligations to both the directors and officers and
4 their corporate affiliates for costs in these judgments, and
5 therefore --

6 THE COURT: You focus on an E&O policy, and that, I
7 take it, provides entity coverage?

8 MR. HAIMS: Yes.

9 THE COURT: And that's a shared policy?

10 MR. HAIMS: Yes.

11 THE COURT: Who is the principal? Who is the named
12 insured?

13 MR. HAIMS: Ally Financial, Inc., the ultimate parent,
14 and it covers Ally and all its capital S subsidiaries.

15 THE COURT: And how much is the policy for?

16 MR. HAIMS: It --

17 THE COURT: And is it stacked coverage?

18 MR. HAIMS: Yeah, stacked coverage.

19 THE COURT: What's the total?

20 MR. HAIMS: Per -- for that year we -- I think it's
21 per year, the total coverage is -- and there's discussion
22 between the insurance -- it's a hundred million dollars per
23 year.

24 THE COURT: Total is a hundred million?

25 MR. HAIMS: It's a hundred million. There's a

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1 retention of twenty-five million under the policy. So the
2 policy that we attached is -- we attached the primary policy
3 and they all follow suit. So there's significant coverage, but
4 these are significant claims.

5 THE COURT: And does Ally have D&O coverage that
6 provides coverage -- I mean, you focus on E&O policy which
7 provides entity coverage, and I guess it would cover officers
8 and employees as well as officers and directors, I suppose,
9 right?

10 MR. HAIMS: Correct.

11 THE COURT: What I don't have a complete picture of is
12 what the total insurance picture looks like. And so I know you
13 argue it's a wasting policy; every dollar spent is a dollar not
14 available at the end of the day. What I don't have a good
15 understanding of, and I don't know whether the evidence will
16 address that, is: is there -- you know, I'm picking numbers out
17 of the air -- is there another 500 million dollars of D&O
18 coverage that potentially covers officers and directors who
19 were named as defendants in all of these cases?

20 MR. HAIMS: Well, there is separate D&O coverage --

21 THE COURT: How much?

22 MR. HAIMS: I believe the D&O tower currently is 275
23 million dollars, and I don't know how many years that goes back
24 in that increment. At some point it was raised; I just don't
25 know what year.

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1 We use the E&O policy because the insurer -- which is
2 in a letter attached in the exhibits -- the insurer
3 specifically acknowledged coverage for these cases under the
4 E&O policy. So that's not disputed by the insurer.

5 THE COURT: Have the D&O policies advanced or
6 reimbursed defense costs for any of the cover insureds in any
7 of the actions pending around the country?

8 MR. HAIMS: I preface this by saying these are Ally
9 Financial policies and ResCap doesn't have the -- my
10 understanding is the answer is no to that.

11 THE COURT: Well, let me just -- are individuals who
12 are named defendants who are officers and directors of ResCap
13 or its debtor affiliates, are they insureds under the AFI D&O
14 policies?

15 MR. HAIMS: They are. They're also indemnified by
16 ResCap and AFI, and currently these or these cases are -- sort
17 of, pre-bankruptcy there was a centralized fee system. It was
18 billed to an Ally accounts payable but the costs were incurred
19 by ResCap for of these cases. So none of them have hit the
20 policy yet. ResCap has been paying the defense costs, to date,
21 in all of these cases.

22 THE COURT: For all defendants?

23 MR. HAIMS: Yes. For all the Ally affiliated
24 defendants, that's correct.

25 THE COURT: Why is that?

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1 MR. HAIMS: Because these are ResCap -- these arose
2 out of the ResCap business.

3 THE COURT: That doesn't answer my question. Is there
4 a --

5 MR. HAIMS: Because there's a contractual indemnity
6 between AFI and its -- AFI affiliates and ResCap that's been
7 contained in the --

8 THE COURT: Has ResCap been paying Ally
9 Financial's --

10 MR. HAIMS: Yeah.

11 THE COURT: -- defense?

12 MR. HAIMS: Yeah. There's a provision in the amended
13 and restated operating agreement between ResCap and Ally that
14 provides that Al --

15 THE COURT: None of that's happened post-petition, I
16 take it?

17 MR. HAIMS: None of that has happened post-petition.
18 But there is a provision that provides, and I'll quote: "To
19 the fullest extent permitted by law ResCap is to indemnify
20 defendant and hold harmless nondebtor affiliates from any and
21 all losses that relate to, arise out of, or result principally
22 from the business operations of ResCap."

23 THE COURT: You just read something to me that says
24 the nondebtor affiliates. When was that agreed to?

25 MR. HAIMS: No, that was bracketed.

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1 THE COURT: You had bracketed that language.

2 MR. HAIMS: Yeah, bracketed. So they've been
3 paying -- they have a duty to indemnify and have in fact been
4 covering the costs of these cases under the amended and
5 restated operating agreement.

6 And finally, the debtors satis -- we think the debtors
7 satisfied, in the alternative, all four factors to obtain 105
8 relief. Three of them, irreparable harm and the ability to
9 restructure, balance of harm, and public policy, I think
10 that --

11 THE COURT: Where's the irreparable harm?

12 MR. HAIMS: Well, I think irreparable harm is the
13 depletion of --

14 THE COURT: I mean, Ally Financial is certainly in a
15 position to pay the defense costs if the debtors can't. Let's
16 put the discovery issue aside for a second, just for a moment.

17 MR. HAIMS: Um-hum.

18 THE COURT: I see it as a big issue, but it's not as
19 if the nondebtor defendants, individual or entities, are being
20 left without someone to pick up the defense costs if the
21 actions proceed against them.

22 MR. HAIMS: Purely from a monetary point of view
23 you're right. However, as I said, all of the discovery, all of
24 the documents, all of the witnesses are ResCap employees,
25 they're ResCap documents, they're housed at ResCap. And the

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1 burden to produce those and to make these witnesses available
2 and to make these documents available is considerable. And in
3 this short time frame between now and confirmation of the plan
4 all of these folks are completely overtaxed and, as we have and
5 you'll hear --

6 THE COURT: Who is the underwriter? Ally Securities?

7 MR. HAIMS: Yes.

8 THE COURT: You're telling me they don't have
9 documents?

10 MR. HAIMS: They don't have --

11 THE COURT: They're an underwriter and they don't have
12 documents?

13 MR. HAIMS: They don't have the loan files and they
14 don't have the -- no, that's correct, Your Honor. They have
15 some documents but they don't have the key doc --

16 THE COURT: Why shouldn't they be -- to the extent
17 that the discovery proceeds in any of the actions, why
18 shouldn't Ally Securities have to produce whatever documents
19 are in its possession -- custody; I'll leave control out of it.
20 From what you're saying, if they've got documents that relate
21 to their underwriting activities, which they better have, why
22 shouldn't they have to produce those? Let's put aside -- I'm
23 putting aside the issue --

24 MR. HAIMS: From the debtor --

25 THE COURT: -- of the documents that are in the

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1 possession of the debtors.

2 MR. HAIMS: From the debtors' point of view, if Ally
3 Securities is going to produce documents solely that Ally
4 Securities has, that's not of concern to the debtor.

5 THE COURT: I'm sorry?

6 MR. HAIMS: That's okay with the debtor; the debtors
7 don't have an issue with that.

8 THE COURT: So you're prepared to carve that out of
9 your request for injunctive relief, that the nondebtors --
10 there's no injunction against discovery requests to the
11 nondebtors to produce any documents that are in their
12 possession?

13 MR. HAIMS: I don't know that I'm prepared to carve it
14 out without consulting, but I think that that --

15 THE COURT: I'm just trying to understand what --

16 MR. HAIMS: Yeah. I --

17 THE COURT: You're asking for very broad relief.

18 MR. HAIMS: Um-hum.

19 THE COURT: And you may be entitled to it all and you
20 may not; you may not be entitled to any of it. But what I'm
21 trying to understand is you say all of the documents are in the
22 possession of the debtors, and that's not a hundred percent
23 accurate, right?

24 MR. HAIMS: I said virtually all of the documents are
25 in there, and I think that that is accurate. I don't know what

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1 Ally Securities has. I don't represent Ally Securities. I'm
2 talking from the debtors' point of view; and from the debtors'
3 point of view, if the debtor has to go --

4 THE COURT: Have you ever represented underwriters
5 before?

6 MR. HAIMS: I have represented underwriters.

7 THE COURT: And do you know what documents
8 underwriters typically have in their files in connection with
9 offerings they've done?

10 MR. HAIMS: Yeah, and I think an underwriter -- they
11 may have an underwriting file. I just don't know. Again, I
12 don't represent Ally Securities here. But from the debtors'
13 point of --

14 THE COURT: No, but you're seeking relief on their
15 behalf.

16 MR. HAIMS: Correct. Again, principally addressed to
17 documents and information that the debtors have.

18 THE COURT: Okay.

19 MR. HAIMS: So in sum, Your Honor, we believe in
20 joining these claims against the nondebtor affiliates to avoid
21 harm to the debtors and allow them the time -- and again, we're
22 only asking for a few months -- to restructure, is, we submit,
23 far greater than allowing the plaintiffs to continue to
24 prosecute these private securities litigation cases during this
25 limited period.

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1 THE COURT: The stipulation that you -- to resolve the
2 issue as to eighteen of the cases --

3 MR. HAIMS: Um-hum.

4 THE COURT: -- has an October 31 --

5 MR. HAIMS: Correct.

6 THE COURT: -- date for expiration of the stay. But
7 yet in the blackline order that you filed last night you're
8 still asking for an injunction or a stay through confirmation.

9 MR. HAIMS: That's correct, Your Honor.

10 THE COURT: Why --

11 MR. HAIMS: Well, that --

12 THE COURT: Why should you get any more than October
13 31 when you agreed in eighteen of the cases to the October
14 31 --

15 MR. HAIMS: Because we consensually agreed to that.
16 This was pre-hearing, before all the work that had to go into
17 this, and this was what we requested in our initial motion.
18 The other was subject to a settlement, and without a settlement
19 I'm not sure why we should go forward --

20 THE COURT: Well, you need to persuade me why it would
21 be appropriate, in the first instance, to extend the stay
22 through confirmation. You know in *McHale v. Alvarez* --

23 MR. HAIMS: I do.

24 THE COURT: -- I didn't grant a stay through
25 confirmation of a plan, but a hard date subject to possible

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1 extension, and in fact the parties agreed to an extension of it
2 before the deadline.

3 MR. HAIMS: Right.

4 THE COURT: I was reluctant there and reluctant here
5 to include -- to not have a specific date and leave it subject
6 to other events. People can always come back and ask to extend
7 it or shorten it, for that matter. If events overtake it and
8 there's some change in circumstances that would justify
9 vacating an injunction, that's always possible too.

10 MR. HAIMS: Your Honor, I think breathing room until
11 October 31, as we agreed to with the other parties, is
12 appropriate. We've made this motion seeking for confirmation
13 through the plan. It's not -- you know, October 31 -- we're
14 likely to be back here October 31, but if that's what Your
15 Honor is most comfortable with --

16 THE COURT: I don't know.

17 MR. HAIMS: -- we'd be -- that's okay with us.

18 THE COURT: All right.

19 MR. HAIMS: I now turn to the evidence.

20 THE COURT: Why don't you offer whatever evidence --

21 MR. HAIMS: Yes. So the first declaration we offer
22 into evidence is the declaration of Jeffrey Lipps. That's
23 dated May 24th, 2012. The declaration is ECF docket number 6.
24 Mr. Lipps is outside counsel to the debtor in many of these
25 cases.

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1 THE COURT: Any objection to the Lipps declaration
2 being admitted into evidence?

3 MR. ETKIN: Michael Etkin, Your Honor, Lowenstein
4 Sandler. We have no objection. We would just like to note for
5 the record that the Lipps declaration does contain statements
6 of law and legal argument. We'll leave it to the Court to
7 separate the wheat from the chaff with respect to that. I just
8 would like to note that for the record.

9 THE COURT: Thank you, Mr. Etkin.

10 All right. The Lipps declaration, which is ECF number
11 6, is admitted into evidence for the purposes of this hearing.
12 (Jeffrey Lipps declaration, dated May 24, 2010, ECF docket
13 number 6, was hereby received into evidence, as of this date.)

14 MR. HAIMS: The second declaration that we offer into
15 evidence is the declaration of James Whitlinger, dated May
16 25th, 2012. The declaration is ECF docket number 7. Mr.
17 Whitlinger is the chief financial officer of debtor,
18 Residential Capital, LLC.

19 THE COURT: Any objections to the Whitlinger
20 declaration?

21 All right. The Whitlinger declaration is admitted
22 into evidence.

23 (James Whitlinger declaration, dated May 25, 2012, ECF docket
24 number 7, was hereby received into evidence, as of this date.)

25 MR. HAIMS: The third declaration that we offer into

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evidence is the declaration of Anne Janiczek, dated May 25th, 2012. The declaration is ECF docket number 8. Ms. Janiczek is the chief human resources officer for the mortgage division at ResCap.

THE COURT: Any objections to the Janiczek declaration?

All right. The Janiczek declaration is admitted into evidence.

(Anne Janiczek declaration, dated May 25th, 2010, ECF docket number 8, was hereby received into evidence, as of this date.)

MR. HAIMS: The fourth and final declaration that we offer into evidence is the supplemental declaration of Jeffrey Lipps dated July 6, 2012. This declaration is ECF docket number 59.

THE COURT: Any objections to the supplemental Lipps declaration?

MR. ETKIN: No objection, Your Honor, just subject to the same statement I made earlier.

THE COURT: All right. The Lipps supplemental declaration is admitted into evidence.

(Supplemental declaration of Jeffrey Lipps, dated July 6, 2012, ECF docket number 59. was hereby received into evidence, as of this date.)

MR. HAIMS: I next turn to the exhibits, Your Honor. Your Honor should have in front of you a binder of exhibits

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1 marked 1 to 31.

2 THE COURT: I've got --

3 MR. HAIMS: Yeah, it's a black one.

4 It is our intention to offer all of these into
5 evidence, so with the Court's permission, I would offer into
6 evidence Exhibits 1 to 31.

7 THE COURT: Have the object -- you provided copies of
8 these to the objectors?

9 MR. HAIMS: Yeah, we have. Yes.

10 THE COURT: Mr. Etkin, do you have objections to any
11 of the exhibits?

12 MR. ETKIN: No, Your Honor. In fact, to short circuit
13 the process a little bit, the parties have all agreed that all
14 exhibits set forth in the binders and the exhibit list filed
15 with the Court will be admitted into evidence in this
16 proceeding.

17 THE COURT: Okay. Anybody else want to be heard on
18 that point?

19 All right.

20 MR. HAIMS: Thank you, Your Honor. I have nothing
21 further at this time.

22 THE COURT: In light of that statement, the debtors'
23 Exhibits 1 through 31 are admitted into evidence.
24 (Debtors' Exhibits 1 - 31 were hereby received into evidence,
25 as of this date.)

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1 MR. HAIMS: Thank you, Your Honor. I have nothing
2 further at this time.

3 THE COURT: Who would you wish to cross-examine, Mr.
4 Etkin?

5 MR. ETKIN: Your Honor, with your permission, I heard
6 a couple of things in Mr. Haims' opening remarks that caused me
7 to just --

8 THE COURT: Before you do that, let me just -- Mr.
9 Haims, do you rest?

10 MR. HAIMS: Yes.

11 THE COURT: Okay.

12 MR. ETKIN: Good afternoon, Your Honor. Michael
13 Etkin, Lowenstein Sandler, on behalf of the plaintiffs in four
14 of the remaining cases before you today in connection with the
15 motion to extend the stay or enforce stay under 105.

16 There may have been some miscommunication, Your Honor.
17 It's happened to me before, so I'm not going to lay this at
18 anyone's doorstep. But I heard some things from Mr. Haims just
19 a moment ago that tie in with some of the discussions that we
20 had in connection with a resolution of this motion, short of a
21 full-blown hearing, that I was under the impression were not
22 acceptable to the debtor, but now it appears that they are.

23 THE COURT: Well, let me ask you this question. I
24 don't want to get -- you know, the parties often do better when
25 they settle matters themselves because sometimes when the Court

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1 decides, somebody's going to be disappointed and it may be that
2 both sides are disappointed. So based on what you heard, do
3 you believe that there is a realistic possibility that you can
4 resolve your differences with the debtors?

5 MR. ETKIN: Yes.

6 THE COURT: How much time do you think you would need
7 to discuss that? I'm only talking about a short recess, but if
8 you think -- you're an experienced lawyer, if you think there's
9 a realistic chance that you can resolve the issues -- obviously
10 eighteen of the case it was resolved. And so how much time do
11 you think you need to do that?

12 MR. ETKIN: From my perspective, based upon what I
13 heard, not much time, Your Honor. Maybe ten or fifteen
14 minutes, unless I'm misreading things. You know, sometimes
15 some of the questions posed by the Court, initially, can also
16 cause parties to maybe rethink certain aspects of a case,
17 and --

18 THE COURT: Sometimes courts do that for a reason.

19 MR. ETKIN: That's --

20 THE COURT: Let me --

21 MR. ETKIN: So I don't think that long.

22 THE COURT: Let me suggest this. It's five after 12
23 on the clock in the court, which is a few minutes fast, but --
24 if we proceed, you're going to cross-examine one witness, is
25 that --

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1 MR. ETKIN: Two, Your Honor.

2 THE COURT: Two?

3 MR. ETKIN: Yes.

4 THE COURT: Do you have an estimate of approximately
5 how much time you think your cross would take?

6 MR. ETKIN: I advised debtors' counsel that I thought
7 that it would be in the range of a half an hour for each --

8 THE COURT: Okay.

9 MR. ETKIN: -- give or take.

10 THE COURT: All right. Let's do this. Let's take our
11 lunch recess now until 1:30. All right? And I don't want to
12 deprive you of lunch, but why don't you see -- now, there are
13 other objectors as well. I don't know whether you can speak
14 for anybody else.

15 Any of the other objectors also think there's cause to
16 believe you can resolve issues?

17 Why don't you identify yourself?

18 MR. DEFILIPPO: Your Honor, Paul DeFilippo for Western
19 & Southern.

20 THE COURT: Right.

21 MR. DEFILIPPO: I'm always willing to talk, Your
22 Honor. We didn't hear anything about one of the key issues to
23 us, which is the need for tolling of any time periods that run
24 against us. I presume the debtors are willing to do that since
25 they didn't oppose that request in our papers, but they haven't

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1 conceded they would.

2 THE COURT: Yeah. I mean, I -- I'm not deciding
3 anything right now, but I have a hard time thinking that I
4 would enter an order enjoining progress of the case without
5 including a provision that tolled limitations.

6 But Mr. Haims?

7 MR. HAIMS: Maybe if I could just refer to that. The
8 issue with respect to the tolling here is tolling of individual
9 former officers and directors who are not named in that law
10 suit. So we've agreed to toll the corporate defendants who
11 were in the lawsuit and even the corporate defendants who are
12 not in the lawsuit. What we didn't agree to do is to chase
13 former directors and officers who are no longer named in those
14 lawsuits to try to get them to toll.

15 MR. DEFILIPPO: The problem with that, of course, is,
16 Your Honor, that those people were dismissed out of our action
17 on jurisdictional grounds. And if they are the beneficiaries
18 of a stay now, without a tolling provision, we are going to run
19 into statute of limitation problems in August. So that issue
20 is a live one for us.

21 And in addition, Your Honor, I think we're the only
22 party that has a discovery cutoff date, at least of the parties
23 that have objected, and that's April 4th, 2013.

24 THE COURT: Where is your action pending?

25 MR. DEFILIPPO: Ohio.

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1 THE COURT: In state court?

2 MR. DEFILIPPO: State court in Ohio. We have a
3 discovery cutoff date. We have nonaffiliated entities that are
4 defendants as well, underwriters like Citibank. And we don't
5 have the means to address the problem of the discovery cutoff
6 date and the absence of a willingness on the part of the
7 debtors to provide their documents which are essential to us to
8 prosecute our claims against the parties that will not be the
9 beneficiaries of a stay under any circumstances.

10 THE COURT: Okay. You want -- yes?

11 MS. MATTHEWS: Kathryn Matthews --

12 THE COURT: Could you come up to the microphone so we
13 get a clear record?

14 MR. HAIMS: Your Honor, if I could just address the
15 discovery stay for one second?

16 THE COURT: Go ahead.

17 MR. HAIMS: The discovery stay -- and we've talked
18 about it -- discovery cutoff is April of 2013, and we don't
19 think that should affect a limited stay --

20 THE COURT: You'll talk about it --

21 MR. HAIMS: -- through October 31.

22 THE COURT: -- during the break.

23 Come on up.

24 MS. MATTHEWS: Kathryn Matthews, Your Honor, from
25 Graiss & Ellsworth on behalf of the FDIC as receiver for two

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1 failed banks.

2 I'm not promising anything but we also think that we
3 could benefit, perhaps, from a little bit of time to talk to
4 the --

5 THE COURT: Well, let's --

6 MS. MATTHEWS: -- debtors' counsel.

7 THE COURT: So I don't use up more of the time than
8 necessary, let's break until 1:30, come back, see whether
9 you're able to resolve issues. Okay? Let's see where we are
10 at 1:30, okay?

11 MS. MATTHEWS: Thank you.

12 MR. HAIMS: Thanks very much, Your Honor.

13 MR. DEFILIPPO: Thank you, Your Honor.

14 (Recess at 12:05 p.m. until 1:35 p.m.)

15 THE COURT: Please be seated. All right. We're back
16 on the record in Residential Capital, the Allstate Insurance
17 Co. adversary proceeding 12-01671.

18 MR. HAIMS: Good afternoon, Your Honor.

19 THE COURT: Mr. Haims.

20 MR. HAIMS: I could report that we've had discussions
21 with all of the counsel, taken individually with Mr. Etkin and
22 his four clients -- his four cases. We have agreed to a
23 resolution of this motion.

24 In the Cambridge Place case, two cases, we'll agree to
25 the motion to dismiss going forward to decision.

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1 In the Union Central case, we'll agree to brief the
2 motion to dismiss towards decision.

3 In the New Jersey Carpenter's case, we'll agree to
4 have class certification go forward to decision. In the New
5 Jersey Carpenter's case, if there is any cleanup discovery
6 against nondebtors under any existing discovery requests
7 relating to class certs -- and Mr. Etkin wasn't aware of any --
8 that would go forward.

9 And in the Cambridge case, we would agree to discovery
10 against Ally Securities of Ally Securities documents so long as
11 it doesn't cause the debtors expense or burden to produce those
12 documents.

13 So we have reached resolution with Mr. Etkin in these
14 four cases.

15 In the FDIC, we have -- that case was just filed after
16 the bankruptcy in May. We have agreed that Ally Securities
17 would file a motion to dismiss. We've agreed to the same
18 discovery with respect to Ally Securities, should that happen.
19 However, we've requested that the motion to --

20 THE COURT: Just --

21 MR. HAIMS: Sure.

22 THE COURT: -- explain the discovery, how you resolved
23 the discovery issue there.

24 MR. HAIMS: Well, we've agreed that Ally Securities*
25 would produce documents that Ally Securities* --

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1 THE COURT: That it has in its possession.

2 MR. HAIMS: -- has, and not documents that the
3 debtor --

4 THE COURT: I assume you're going to document what
5 you're --

6 MR. HAIMS: Yeah, we will.

7 THE COURT: That's fine.

8 MR. HAIMS: We'll work on language.

9 THE COURT: Go ahead.

10 MR. HAIMS: We just didn't have time.

11 THE COURT: Go ahead.

12 MR. HAIMS: For the FDIC, we've asked in return for
13 the motion to dismiss, and for the Ally Securities' production,
14 we've asked that the motion to withdraw and the motion to
15 dismiss before Your Honor be withdrawn or stayed till after the
16 discovery period -- the stay period, and we don't have
17 confirmation on that as of yet.

18 And lastly, with respect to Western & Southern, those
19 discussions were not fruitful. Western & Southern is still
20 insisting on tolling agreements from the dismissed individuals,
21 which we cannot deliver. And they've now asked for discovery
22 from the debtors, and we just are not going to agree to that.
23 So with respect to Western & Southern and perhaps the FDIC,
24 we're going to have to go forward with the hearing.

25 That's all I have, Your Honor.

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1 THE COURT: Okay. Mr. Etkin, anything you want to
2 add?

3 MR. ETKIN: Those are the general contours, Your
4 Honor, of the agreement that we've worked out. Of course we
5 have to reduce it to a stipulation, and other aspects of the
6 existing stipulation that's filed will be baked into ours as
7 well. And we appreciate Your Honor giving us the time to
8 attempt to work it out.

9 THE COURT: I'm glad you were able to work it out.

10 MR. ETKIN: Thank --

11 THE COURT: Thank you very much.

12 MR. ETKIN: Thank you very much, Your Honor. And may
13 I be excused?

14 THE COURT: You're excused.

15 And who's representing FDIC?

16 MS. MATTHEWS: I am, Your Honor.

17 THE COURT: Why don't you come on up to the
18 microphone? Tell me your name again, I'm sorry.

19 MS. MATTHEWS: Kathryn Matthews from Graiss &
20 Ellsworth.

21 THE COURT: Okay, Ms. Matthews. So where do things
22 stand from your standpoint?

23 MS. MATTHEWS: Well, as Mr. Haims said, we have
24 reached an agreement that Ally Securities* would go ahead and
25 make a motion to dismiss in conformance with Judge Swain's

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1 schedule and that should there be the opportunity --

2 THE COURT: I thought there was no schedule yet.

3 MS. MATTHEWS: Oh, there's a schedule in the motion to
4 dismiss. The parties are to submit their briefing by July
5 30th.

6 THE COURT: Okay.

7 MS. MATTHEWS: And the motion is to be fully submitted
8 by the end of October.

9 THE COURT: Okay.

10 MS. MATTHEWS: There's no discovery that's pending
11 right now, but should there be the opportunity to take some
12 discovery, that we would be permitted to go ahead and serve
13 discovery on Ally Securities* itself for its own documents. I
14 am just waiting to hear back from the client as to whether we
15 will be willing to agree to put our motion to withdraw the
16 reference and our motion to dismiss in abeyance until October
17 31st, and I just don't have an answer on that right now.

18 THE COURT: Okay. When do you -- so Mr. Haims, it was
19 a little unclear to me, you have the agreement on the other
20 issues, is everything dependent on -- is an agreement -- is it
21 all or nothing? That's what I'm trying to understand.

22 MR. HAIMS: Well, I think, Your Honor, otherwi -- I
23 mean, from our point of view, if we have to now then brief a
24 motion to dismiss, if the debtors now have to brief a motion to
25 dismiss, you know, we're here and this might as well go

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1 forward, but you know, it's --

2 MS. MATTHEWS: From our point of view, if the Court
3 lacks jurisdiction to go over this dispute, then that should be
4 decided, regardless of what we agree to as far as --

5 MR. HAIMS: And we're not saying jurisdiction
6 shouldn't be decided. All we're saying is put everything in
7 abeyance until October 31 and all of those issues can be
8 resolved then.

9 THE COURT: Ms. Matthews, how is it that you propose
10 to proceed at this point?

11 MS. MATTHEWS: If I cannot get my client on the phone
12 to hash this out then I will participate and cross-examine as
13 we had planned.

14 THE COURT: And you've endeavored to get your client
15 and you can't?

16 MS. MATTHEWS: I have.

17 THE COURT: Are they going to be available later this
18 afternoon?

19 MS. MATTHEWS: I would certainly think so. It does
20 seem silly to go through with the cross-exam -- the witnesses
21 as to discovery burden when we've -- I think the parties have
22 agreed that the FDIC's action really does not --

23 THE COURT: Right.

24 MS. MATTHEWS: -- impose any discovery burden, and
25 nothing is really set to happen between now and October 31st

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1 other than briefing on the motion to dismiss and perhaps
2 initial disclosures by the parties.

3 THE COURT: And you think Judge Swain is going to have
4 a burning desire to deal with your motion to withdraw the
5 reference?

6 MS. MATTHEWS: I can't speak to Judge Swain's desires.

7 THE COURT: So you filed your motion to dismiss here.

8 MS. MATTHEWS: We did.

9 THE COURT: And that part of it let me make easy, I'm
10 just going to adjourn the motion -- as long as it remains here
11 in this court, I'll just simply adjourn briefing and argument
12 on the motion to dismiss until after October 31.

13 Now, you do have a motion to withdraw the reference.
14 I don't get to speak to that.

15 MS. MATTHEWS: Shall we go ahead and hopefully in the
16 next fifteen, twenty minutes I can hear back from my client and
17 I --

18 THE COURT: Sure. Let me see where --

19 MS. MATTHEWS: -- I'll, you know, perhaps I go last in
20 the line and hopefully by the time it would be my turn to
21 examine the witnesses I can report back.

22 THE COURT: Yes, let's try and proceed that way. It
23 does seem silly to me to go forward with your cross-
24 examination, but let's let me see where things stand. All
25 right.

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1 MS. MATTHEWS: Thank you.

2 THE COURT: Who's representing W&S?

3 MR. DEFILIPPO: Good afternoon, Your Honor. Paul
4 DeFilippo for Western & Southern.

5 Your Honor, I don't think we're going to need to
6 cross-examine any of the declarants, so if it pleases the
7 Court, I could make a closing argument. I'd need to move in --

8 THE COURT: Yeah, you need to move your exhibits.

9 MR. DEFILIPPO: I need to move my exhibits in, which
10 are Western & Southern A, B, and C attached to the Fitzgerald
11 declaration. And I'm prepared to proceed with argument at Your
12 Honor's convenience.

13 THE COURT: Well, let me just ask, are there any
14 objections as to Exhibits A, B, and C -- Western & Southern A,
15 B, and C?

16 MR. HAIMS: No, Your Honor.

17 THE COURT: All right. They're admitted into
18 evidence.

19 (Western & Southern Life Insurance Co.'s Exhibits A, B, and C,
20 attached to the Fitzgerald declaration, were hereby received
21 into evidence, as of this date.)

22 THE COURT: Let me just -- if I have to go ahead and
23 decide I'll go ahead and decide, but let me just -- I want to
24 make sure I understand what issues are separating you in terms
25 of resolving the matter. You raised the issue before lunch

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1 that, as I understand it, there were some -- I don't know
2 whether they're present or former officers and directors who
3 were dismissed from the pending action.

4 MR. DEFILIPPO: Former, Your Honor.

5 THE COURT: Former? Okay, who have been dismissed
6 from the -- was that pursuant to a decision of the Court?

7 MR. DEFILIPPO: Yes, that decision is Exhibit W&S B,
8 and they were dismissed for lack of personal jurisdiction of
9 the Ohio court over them. The debtors have informed us they
10 are unable to consent to the tolling provisions on behalf of
11 those parties. Since they're former officers and directors,
12 the debtors don't represent them, and to my knowledge, they're
13 not otherwise represented in this proceeding.

14 THE COURT: Well, let me stop you there.

15 Mr. Haims, you're asking -- are you asking for relief
16 as to those former officers and directors as well?

17 MR. HAIMS: No, Your Honor. Oh, yes -- yes, Your
18 Honor.

19 THE COURT: Yes, you are.

20 MR. HAIMS: I'm sorry, I --

21 THE COURT: Well --

22 MR. HAIMS: They were in the mo -- the motion to
23 dismiss came down after the --

24 THE COURT: The decision on the motion to dismiss --

25 MR. HAIMS: The decision came down after the initial

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1 moving of the papers.

2 THE COURT: I mean, I hear you about this, but if I
3 grant a preliminary injunction, in one fashion or another, I
4 would undoubtedly condition it on the agreement or consent of
5 any party for whose benefit the injunction is issued consents
6 to toll the statute of limitations. I am not going to give --
7 I mean, it certainly -- the whole purpose of an injunction is
8 to maintain -- it's essentially to maintain the status quo.
9 And if the statute of limitations -- you know, the continuing
10 running of the statute of limitations as to any individual or
11 entity that would benefit from the injunction, that seems
12 inconsistent to me.

13 So I mean, I could understand you saying you don't
14 have the authority to agree on those individuals' behalf, since
15 you don't represent them, to a tolling of the statute of
16 limitations. But any order that was crafted, either based on a
17 decision by me or through settlement with Mr. DeFilippo, could
18 provide that the stay applies to individuals or entities, to
19 the extent that they agree or consent to a tolling of any
20 applicable statute of limitations. I mean, it seems -- I mean,
21 do you have any authority that says I ought to enjoin Mr.
22 DeFilippo's clients from attempting to proceed against anyone
23 but allow the statute of limitations to run in the meantime?

24 MR. HAIMS: Your Honor, just to be -- I just want to
25 be clear.

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1 THE COURT: Come up to the microphone so we have a
2 clear record.

3 MR. HAIMS: I'm sorry, I just want to be clear. And
4 you're right, I don't have -- I don't represent them, I don't
5 know them, and I don't have authority to speak on their behalf,
6 but the motion, when it was filed and the relief we were
7 seeking was only seeking to stay the Ohio action and the claims
8 in the Ohio action. The tolling agreement that's being
9 requested is far broader than that, because they're not parties
10 in the Ohio action. And for that, that's a compl -- I think a
11 completely different --

12 THE COURT: That's why I asked you --

13 MR. HAIMS: -- topic.

14 THE COURT: -- the question: Are you seeking to have
15 the injunction apply to them? First you said no --

16 MR. HAIMS: Well --

17 THE COURT: -- then you talked to somebody in the back
18 and then you said yes.

19 MR. HAIMS: Well, in the --

20 THE COURT: So you can't have it both ways. If you
21 want the injunction to apply as to them, then you may not be
22 able to agree on their behalf to toll the statute of
23 limitations, but if I issue -- if I issue the injunction, I
24 could very well condition it on their consent to toll. So are
25 you seeking an injunction on their behalf or not?

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1 MR. HAIMS: We certainly were when we made the motion
2 because the case was still --

3 THE COURT: Well --

4 MR. HAIMS: -- pending against them.

5 THE COURT: -- but now you're here today and that's --

6 MR. HAIMS: Now we're here today, and I -- I'd have to
7 consult. I'd have to think about that one. I just haven't
8 that one through.

9 THE COURT: Well, Mr. DeFilippo, does that solve your
10 problem if --

11 MR. DEFILIPPO: It goes a long way, Your Honor. The
12 other issue is the Ally Securities*, which is the only
13 nondebtor affiliate that is still a defendant, and whether it's
14 appropriate to stay the action against them. We don't think it
15 is.

16 THE COURT: Well, look, that's -- then you may as well
17 just go ahead and fight this battle.

18 MR. DEFILIPPO: Your Honor --

19 THE COURT: I mean, everybody else who has agreed, and
20 now --

21 MR. DEFILIPPO: Yes. I hate to be -- we have the
22 deadline of April 4th, 2013 for completion of fact disc -- of
23 all discovery in that case. I don't know if Ally Securities*
24 is going to be ultimately the beneficiary of a permanent stay
25 in a plan or otherwise, but if they're not, I can envision

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1 difficultly complying with the Ohio court's deadlines if they
2 have to play catch-up in terms of their ability to defend that
3 action, which will proceed in their absence if you do stay it.
4 So I'm not in a position where I can consent to a stay against
5 them. I understand that Your Honor has the power to do so and
6 the discretion to do so. We don't think that requiring them to
7 defend themselves in any way threatens the debtors'
8 reorganization. We don't believe there has been any showing --

9 THE COURT: Well, that's the issue on the motion.

10 MR. DEFILIPPO: Right.

11 THE COURT: And you know, if it goes forward on a
12 contested basis, I'll decide that.

13 MR. DEFILIPPO: We also ask Your Honor, if you do
14 impose a stay, not to permit it to be open ended till
15 confirmation.

16 THE COURT: I've already -- I think I've sort of made
17 that point clear --

18 MR. DEFILIPPO: I --

19 THE COURT: -- before. I didn't rule, but I pretty
20 well indicated. That won't foreclose the debtor from coming
21 forward seeking to extend it or --

22 MR. DEFILIPPO: Us seeking --

23 THE COURT: -- the plaintiffs in the action coming
24 forward seeking to vacate it. That --

25 MR. DEFILIPPO: And I'd like to just correct one thing

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1 Mr. Haims said earlier. We understand we have to get Your
2 Honor's permission to take discovery of the debtors. We're
3 going to file a motion to do that, so we will be back here
4 making the arguments that go to whether or not it's truly an
5 imposition on the debtors for them to produce --

6 THE COURT: Well, we better hash that out then today.
7 You're too far apart. I mean, if -- I mean, the issue of --
8 there is an automatic stay in place with respect to discovery
9 from the debtors.

10 MR. DEFILIPPO: Yes, Your Honor.

11 THE COURT: This motion has nothing to do with that.

12 MR. DEFILIPPO: We agree with that.

13 THE COURT: Okay.

14 MR. DEFILIPPO: But we need the debtors --

15 THE COURT: And if you make the motion to vacate the
16 stay, you're going to carry the burden.

17 MR. DEFILIPPO: I understand that as well, Your Honor.
18 But we can't avoid the fact that (a), the debtor has all the
19 documents that we need and (b), we have to --

20 THE COURT: Are you going to pay for them to produce
21 it all?

22 MR. DEFILIPPO: I can't commit to that without talking
23 to our client, but --

24 THE COURT: Well, I'm not going to decide -- that
25 issue is not before me today, but you or anyone else who is

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1 seeking to lift the stay to launch discovery against the
2 debtors is going to carry a very heavy burden.

3 MR. DEFILIPPO: Understood, Your Honor.

4 THE COURT: Okay. Ms. Matthews, do you want to try
5 and see if you can track your client down again?

6 MS. MATTHEWS: Sure.

7 THE COURT: I just -- because it just doesn't --
8 before we -- if we're going to go forward, that's fine, we'll
9 go forward. We're going to go forward anyway, but I want to
10 know -- I think you ought to know whether you need to actively
11 participate.

12 MS. MATTHEWS: Yes. Could I just have a five-minute
13 break?

14 THE COURT: Let's -- we'll break till a quarter after
15 2, because it doesn't sound like -- we're not going to have any
16 cross-examination of any witnesses, so we'll just have
17 argument. If you want to cross-examine, obviously you can, if
18 we're going to go forward with it. So let's break until a
19 quarter after 2. Okay? Thank you.

20 (Recess from 13:54 p.m. until 14:16 p.m.)

21 THE COURT: Please be seated.

22 MR. HAIMS: Your Honor, I can report some additional
23 progress. We've agreed with the FDIC that the motion to
24 dismiss will go forward, the motion to dismiss in the
25 underlying case, the Ally Securities*, if any discovery, will

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1 go forward -- could go forward. The motion to dismiss in this
2 adversary proceeding will be put off till October 31. And --

3 THE COURT: By that --

4 MR. HAIMS: Well --

5 THE COURT: -- a date after October 31 --

6 MR. HAIMS: Yeah.

7 THE COURT: -- that it gets set.

8 MR. HAIMS: And while the FD -- counsel doesn't have
9 authority to withdraw the motion to withdraw, we have agreed
10 that if Judge Swain were to grant the motion to withdraw, they
11 would agree to the same terms of the stay --

12 THE COURT: Okay.

13 MR. HAIMS: -- till October 31. So with that, I think
14 we have agreement with the FDIC.

15 THE COURT: Ms. Matthews?

16 MS. MATTHEWS: Yes, that's right.

17 THE COURT: Okay, thank you very much.

18 MR. HAIMS: And there's one further clarification with
19 respect to Western & Southern and the discussion on the tolling
20 agreement. Again, I don't represent these --

21 THE COURT: I know.

22 MR. HAIMS: -- these individuals, but from the
23 debtors' point of view, we won't object to the tolling
24 agreement on the same terms of a tolling agreement that we have
25 in the stipulation with all the other eighteen defendants,

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1 which tolls any claims that could be asserted by them in the
2 MBS action during the stay period. That's all we ask for the
3 relief, and that's -- I think for that we wouldn't object.

4 THE COURT: Okay.

5 MR. O'NEILL: Your Honor, Brad O'Neill, Kramer Levin
6 on behalf of the committee. Just a few brief comments.

7 The committee is generally supportive of the debtors'
8 application, subject to certain limitations. We're mindful of
9 the fact that now all but one of the defendants in the
10 adversary have consented to the relief, including two members
11 of the committee or --

12 THE COURT: I didn't understand that, but you'll
13 explain it.

14 MR. O'NEILL: It is a fact, but our supportiveness,
15 however, is conditioned on two things which I think are
16 embodied in the stipulations that you've seen and I think
17 reflected in your comments this morning. And that is that the
18 injunction should be finite and specifically limited through
19 October 31 and subject to a complete reservation of rights so
20 that all parties, when October 31 arrives, if there is a
21 dispute about the propriety of continuing the injunction, all
22 parties rights are reserved and all parties, including the
23 committee, can make whatever arguments are appropriate.

24 THE COURT: Thank you.

25 MR. O'NEILL: But on that basis -- and also, by the

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1 way, the additional limitations Your Honor discussed this
2 morning seem appropriate.

3 THE COURT: The additional limitations being --

4 MR. O'NEILL: On the scope of the injunction to allow
5 motions to dismiss to go forward. But subject to those
6 limitations, we're supportive of the debtors' application.

7 THE COURT: Thank you very much.

8 Anybody else want to be heard before Mr. DeFilippo?

9 Okay, we don't have any movement with respect to you
10 and your clients?

11 MR. DEFILIPPO: I have no authority to consent to the
12 injunction, Your Honor.

13 THE COURT: Okay. Mr. Haims, you want to argue?

14 MR. HAIMS: Well, I --

15 THE COURT: Well, let me say, do you rest, Mr.
16 DeFilippo?

17 MR. DEFILIPPO: I rest, Your Honor.

18 THE COURT: Okay. So both sides have rested.

19 Go ahead, Mr. Haims, you want to argue?

20 MR. HAIMS: Your Honor, I'm not going to repeat what I
21 said this morning. I'll keep my remarks very brief.

22 We're talking about we have one case. That case
23 involves, as I understand it, 23,000 loans. They're second
24 lien loans, so in addition to --

25 THE COURT: All second liens?

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1 MR. HAIMS: They're all second liens, 23,000, which
2 entail not only 23,000 second loan files, but in many cases
3 will involve first lien files as well. The scope is large.
4 Just because it's one deal and because it's one case doesn't
5 lessen the burden at all. We've said and we've agreed with
6 twenty-six now or twenty-five -- four of the twenty-five that
7 certain things can go forward. The one thing that we have not
8 agreed and will not agree to go forward is discovery against
9 the debtors, and I think that's where we draw the line.

10 THE COURT: Just so that I am clear --

11 MR. HAIMS: Um-hum.

12 THE COURT: -- give me the name of the case. I just
13 want to make sure I --

14 MR. HAIMS: Western & Southern. It's -- I have the
15 full name here. It's Western & Southern Life Insurance Co. v.
16 Residential Funding, Co. It's in the Ohio -- it's in Ohio
17 state court.

18 THE COURT: Hamilton County?

19 MR. HAIMS: Hamilton County.

20 THE COURT: Court of common pleas in Hamilton.

21 MR. HAIMS: Right, and the individual defendants were
22 dismissed, and the only nondebtor affiliate in that case is
23 Ally Securities. So we've gotten very broad discovery
24 requests. The discovery requests -- or Ally Securities* has
25 gotten very broad discovery requests. They request loan files.

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1 As I just said, the loan files are large, notwithstanding it's
2 one deal and one case. We think those are -- we don't think
3 those are in Ally -- we think those are not subject to
4 production by Ally Securities* but we think an injunction here
5 is necessary so that we're not litigating this issue again as
6 to the scope of Ally Securities' production and whether those
7 documents have to be produced that are in the debtors'
8 possession, custody and control by Ally Securities*. Now,
9 other than that, there's nothing --

10 THE COURT: Tell me, this was listed as number 27 on
11 Exhibit B to the complaint. It's the list that I'm --

12 MR. HAIMS: It was alphabetically --

13 THE COURT: -- that I'm looking at in front of me and
14 it was for me to keep track. Who are the debtor defendants? I
15 see the lead defendant was Residential Funding, which is a
16 debtor.

17 MR. HAIMS: There was --

18 THE COURT: Who are the -- what are you look -- do I
19 have something that -- a chart that shows --

20 MR. HAIMS: You just have the complaint. And we have
21 in the Lipps declaration, which is docket number 6, on page 13,
22 paragraph 34. And the debtor entities that are named are --

23 THE COURT: Hang on a second.

24 MR. HAIMS: Your Honor, would it help if I just give
25 you a copy of it?

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1 THE COURT: It would be.

2 MR. HAIMS: Yes.

3 THE COURT: It would.

4 MR. HAIMS: Okay.

5 THE COURT: Thank you. Thank you.

6 MR. HAIMS: And because there are abbreviations, the
7 debtors' names are: Residential Funding, Co., LLC; GMAC
8 Mortgage, LLC; Residential Accredited Loans, Inc.; Residential
9 Asset Mortgage Products, Inc.; and Residential Funding Mortgage
10 Securities I, Inc.

11 THE COURT: Okay. And Ally Securities* is the only
12 remaining nondebtor affiliate?

13 MR. HAIMS: Correct.

14 THE COURT: And are there nonaffiliate defendants in
15 the case? Do you know, Mr. DeFilippo, can you help me on that?

16 MR. DEFILIPPO: Pardon me, Your Honor, I didn't hear
17 your question.

18 THE COURT: Are there --

19 MR. HAIMS: There are.

20 THE COURT: -- defendants who are --

21 MR. DEFILIPPO: Nonaffiliates?

22 THE COURT: -- nondebtors or affiliates?

23 MR. DEFILIPPO: There are six or seven underwriters
24 that are not debtors or affiliates of the debtors.

25 THE COURT: Okay. Let me just finish reading this.

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1 MR. HAIMS: Yes, of course, Your Honor.

2 (Pause)

3 THE COURT: Are any of the individual former directors
4 and officers still defendants in the case?

5 MR. HAIMS: No, Your Honor --

6 THE COURT: Everybody -- they were all dismissed on --

7 MR. HAIMS: They were all dismissed on the motion
8 to --

9 THE COURT: -- jurisdiction --

10 MR. HAIMS: Correct.

11 THE COURT: -- personal jurisdiction grounds?

12 MR. HAIMS: Correct.

13 THE COURT: Are there any unaffiliated individuals who
14 remain in the case? Do you understand what I mean, Mr.
15 DeFilippo?

16 MR. DEFILIPPO: Yeah, there are defendants.

17 MR. HAIMS: Individuals, Your Honor?

18 THE COURT: Yeah, individuals.

19 MR. DEFILIPPO: Oh, individuals?

20 THE COURT: They're all entities that remain as
21 defendants in that case.

22 MR. DEFILIPPO: Correct.

23 (Pause)

24 THE COURT: Go ahead, Mr. --

25 MR. HAIMS: So the only thing I would add is that we

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1 think the injunction should be granted. If it's not granted
2 we're going to be back here, we're going to be fighting over
3 the production of documents over the -- in the debtors'
4 possession, custody and control, and we just think --

5 THE COURT: Well, you may be back over that anyway.

6 MR. HAIMS: We may be anyway, but --

7 THE COURT: Because the only -- as I understand it
8 now, the only issue is whether I grant the preliminary
9 injunction, probably the October 31 date as to Ally Financial.

10 MR. HAIMS: Ally Securities*.

11 THE COURT: Ally Securities*, I'm sorry, Ally
12 Securities. Ally Financial is out of the case too?

13 MR. HAIMS: They're not in that case. They were never
14 in that case.

15 THE COURT: They're not --

16 MR. HAIMS: That's just an Ally Securities* case.

17 THE COURT: Okay, Ally Securities. Whether I grant
18 the injunction as to Ally Securities, other than for the
19 motions to dismiss, which are pending.

20 MR. DEFILIPPO: Already been heard and decided.

21 MR. HAIMS: Already been decided.

22 THE COURT: Already been decided.

23 MR. HAIMS: That's in discovery. That case is in
24 discovery.

25 THE COURT: That case is in discovery.

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1 MR. HAIMS: And that's the one with the discovery
2 cutoff in April. So all we're saying is --

3 THE COURT: Let me ask this.

4 MR. HAIMS: -- a temporary hold till April.

5 THE COURT: Let me ask this. Has Ally Securities*
6 produced documents that are in its possession?

7 MR. HAIMS: No, not yet.

8 THE COURT: When -- you've receive document requests
9 for Ally Securities.

10 MR. HAIMS: Requests, correct.

11 THE COURT: Have you responded to the written
12 requests?

13 MR. HAIMS: I believe we have, Your Honor, yes, we
14 did, just recently.

15 THE COURT: And when were the documents -- absent an
16 injunction, when are Ally Securities* documents to be produced?

17 UNIDENTIFIED SPEAKER: It's a rolling basis.

18 MR. HAIMS: Yeah, it's a rolling basis. There's no
19 schedule other than the discovery cutoff at the end --

20 THE COURT: Okay.

21 MR. HAIMS: -- answers and written responses were put
22 in, I believe it was last week.

23 THE COURT: Have any -- you said it was a rolling
24 production. Have any of Ally Securities* documents been
25 produced so far?

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1 MR. HAIMS: In this case?

2 THE COURT: In this -- in the Western & Southern case.

3 MR. HAIMS: No, the written response was just put in
4 last week.

5 THE COURT: Okay.

6 MR. HAIMS: One of the issues -- as I understand it,
7 the parties are still negotiating a confidentiality agreement
8 which has been holding up the production.

9 THE COURT: Are you able to tell me, by category or
10 type, what documents Ally Securities* has in its possession
11 that are responsive to the outstanding request?

12 MR. HAIMS: I can't, Your Honor, because I'm not
13 counsel --

14 THE COURT: Can any of your colleagues who are here?

15 MR. HAIMS: Yes, yes, yes.

16 THE COURT: Is counsel for Ally Securities* here?

17 MR. HAIMS: Hang on. Yes.

18 THE COURT: Come on up to the microphone.

19 MR. HAIMS: This is Mr. Lipps.

20 THE COURT: The man with the declaration.

21 MR. LIPPS: The man with two declarations.

22 THE COURT: Two declarations, okay.

23 MR. LIPPS: Jeff Lipps with Carpenter Lipps & Leland.
24 We are of-counsel right now for Ally Securities* but in the
25 process of transitioning out of that role.

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1 At this point in time you wanted to know what type of
2 documents --

3 THE COURT: Yes.

4 MR. LIPPS: -- Ally Securities* would have. What we
5 understand they have is they typically would have a deal file
6 that would --

7 THE COURT: They're going to have a due diligence
8 file.

9 MR. LIPPS: Well, the deal file would have the due
10 diligence and the documentation in electronic form. There is a
11 server that we call the Bethesda server, and there's a file
12 tree and we have to work through and identify which of those
13 files would actually relate to the particular deal at issue.
14 There's only one for Ally Securities*; it's in the Western &
15 Southern case.

16 There are also some electronic communications, either
17 instant messages or other communications like that that are
18 captured at the broker-dealer level that would probably have
19 communications that would relate to this securitization or any
20 work that they had done in it.

21 And then there is Outlook type e-mails that may or may
22 not require restoration, which are on the debtors' server, so
23 to speak. They're on the debtors' backup tape, so there would
24 be --

25 THE COURT: But not on your -- you don't have backup

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1 tapes?

2 MR. LIPPS: Not for that -- not for the Outlook e-mail
3 system. It was managed through the ResCap organization, so for
4 those Ally Securities* employees that use the Outlook, those
5 backup tapes would be in the possession of the debtors.

6 THE COURT: Okay. Have you endeavored to determine
7 whether any of the individuals who worked on this matter from
8 Ally Securities* have files? I mean, has a search been made of
9 their files as well?

10 MR. LIPPS: We have collected files from the
11 individuals that were involved in these securitizations while
12 we were representing them as Ally Securities* and then pre-
13 petition when we were involved in that. The people that were
14 in the securitization effort at Ally Securities* have now gone,
15 so there are no current employees there that had anything to do
16 with any of the securitizations. So it would be a historic
17 capture that we have done.

18 THE COURT: I mean, what you say is not evidence, but
19 can you at least -- I mean, what you're saying now as opposed
20 to what was in your declarations --

21 MR. LIPPS: I hope I'm not inconsistent.

22 THE COURT: No, well -- I mean, I would like you to
23 address, if you could, the effort or burden that would be
24 required to produce the documents, electronic or paper, that
25 are in the possession of Ally Securities*, not what's on the

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1 debtors' servers but what's in the possession or custody of
2 Ally Securities*.

3 MR. LIPPS: Well, if we're going to exclude the
4 Outlook, because I can speak to that. That is a burden because
5 that's the burden that was similar to what we were addressing
6 with respect to e-mail searches in my declaration. But as to
7 the Bethesda server, unfortunately there are no current
8 employees, so what we have, essentially, is a file tree, and
9 it's, like, thousands of entries on there.

10 Am I right on that?

11 Yeah, there's thousands of entries, and part of it is
12 we don't have any legacy knowledge, so there is a substantial
13 effort that has to go, and a lot of it's, like, hit and miss.
14 And so you'll be having IT people sort of hitting and missing.
15 And again, the IT people are people at ResCap. They're not --
16 the broker-dealer at Ally Securities* does not have an
17 independent team of employees that are doing this. So it would
18 be through the debtors, again, and you have to hit and miss and
19 try and find the right file trees with the right information.
20 So it is -- it has been slow undertaking and we've been in
21 process with it in a couple of these cases because until this
22 motion was heard we had an obligation to try and participate,
23 and it's been a slow haul.

24 THE COURT: Well, who controls the Bethesda server?
25 Is that what you're referring to?

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1 MR. LIPPS: It's sitting there on -- well, who has
2 possession of it?

3 UNIDENTIFIED SPEAKER: It belongs to Ally Securities.

4 MR. LIPPS: That's what I thought. The Bethesda
5 server, when the company was closed down, at least for the
6 securitization side of it, that is owned by Ally Securities,
7 but the actual Bethesda server documentation is being handled
8 by the eDiscovery or IT people within ResCap.

9 THE COURT: So Mr. Haims, the agreements that were
10 further reached in court would provide for Ally Securities* to
11 produce documents that are in its possession. How are those
12 going to be gathered? Have those been gathered? How are they
13 going to be gathered? Is it any different than --

14 MR. HAIMS: It's no different than he's just
15 described.

16 THE COURT: Okay. Mr. DeFilippo?

17 MR. DEFILIPPO: Yes, Your Honor.

18 THE COURT: I don't know whether you were in court at
19 the earlier status conference or on the phone for -- I just
20 don't recall; I apologize for that.

21 MR. DEFILIPPO: Earlier today, Your Honor?

22 THE COURT: No, no, earlier in the -- because there
23 was -- very early in the case with the adversary we had a --

24 MR. DEFILIPPO: I was not.

25 THE COURT: -- status conference, and I had indicated

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1 at that point, asking counsel for permission to speak with the
2 judges in the actions. I have not spoken with the judge in
3 Ohio.

4 I mean, I'll report briefly. I had previously spoken
5 to Judge Cote, Judge Swain, Judge Daniels. Judge Baer's been
6 on vacation, so I haven't spoken to him. I haven't spoken to
7 any of the state court judges. Most of those matters were
8 resolved by agreement, in any event, so I have not -- did not
9 speak to the judge who has the matter.

10 In the conversations I had with the judges with whom I
11 spoke was basically just to tell them that this adversary had
12 been filed, there was a motion for a preliminary injunction.
13 The day I spoke to Judge Cote was the morning after the motion
14 to withdraw the reference was filed. I think that was the
15 first news she had about it when I told her about it. And
16 Judge Swain, it was a similar kind of conversation; the motion
17 to withdraw the reference hadn't been filed yet when I talked
18 to him. But I mean, your state court action -- your client's
19 state court action focuses solely on -- for shorthand I'll call
20 it ResCap RBS offerings.

21 MR. DEFILIPPO: No, Your Honor.

22 THE COURT: It doesn't?

23 MR. DEFILIPPO: Less than half of our offerings are
24 ResCap --

25 THE COURT: Okay.

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1 MR. DEFILIPPO: -- RMBS. There are other originators
2 that are part of the lawsuit -- loans originated by others than
3 ResCap and underwritten by the nonaffiliated underwriters.

4 THE COURT: Okay. How much of the case is made up of
5 the ResCap.

6 MR. DEFILIPPO: May I consult with my --

7 THE COURT: Yes.

8 MR. DEFILIPPO: -- colleague?

9 THE COURT: Please go ahead.

10 MR. DEFILIPPO: Seventy million face of ResCap loans,
11 and ninety-five million of non-ResCap.

12 THE COURT: Okay. What's the schedule in your case?

13 MR. DEFILIPPO: The schedule is, all discovery must be
14 completed by April 13th -- I'm sorry, April 4th, 2013. And
15 there's a trial date set for January of 2014. So we have a
16 little less than nine months to complete discovery.

17 THE COURT: Fact and expert discovery? Everything?

18 MR. DEFILIPPO: All discovery. And that's set forth
19 in Exhibit 3.

20 THE COURT: And if you were enjoined from proceeding
21 with your -- enjoined until October 31 and subject to further
22 order from proceeding with your case against Ally Securities,
23 how to you envision proceeding with the balance of your case?

24 MR. DEFILIPPO: Well, we would proceed against the
25 unaffiliated underwriters with respect to the nondebtor

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1 documents.

2 THE COURT: I mean, there's nothing that inextricably
3 links the ResCap piece of the case with the non-ResCap piece of
4 the case.

5 MR. DEFILIPPO: Well, Your Honor, we'd hate to have to
6 try two cases, of course.

7 THE COURT: No doubt.

8 MR. DEFILIPPO: And I'm sure all the defendants would
9 hate to have to try two cases. That would be extremely
10 wasteful.

11 THE COURT: When you say "all the defendants" --

12 MR. DEFILIPPO: The nondebtor defendants.

13 THE COURT: They're not going to -- the affiliated
14 nondebtor defendants are only -- you know, if I enjoin -- if I
15 stay it, they're only going to try it once. It may not be at
16 the same trial that you try --

17 MR. DEFILIPPO: Right.

18 THE COURT: -- against the -- on the non-ResCap --

19 MR. DEFILIPPO: Yes.

20 THE COURT: -- offerings.

21 MR. DEFILIPPO: Correct, Your Honor. What I was
22 trying to say was that it's our assumption that the parties and
23 the Court would probably prefer -- the Court in Ohio, that
24 is --

25 THE COURT: To do it once?

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1 MR. DEFILIPPO: -- would probably prefer to do it
2 once.

3 THE COURT: As I would only prefer to do it once. No
4 doubt.

5 MR. DEFILIPPO: Yes.

6 THE COURT: What, if any good does it do you if --
7 because there are no pending motions. They've been decided
8 already.

9 MR. DEFILIPPO: Yes, Your Honor.

10 THE COURT: What good would it do you if I permitted
11 you to obtain document production from Ally Securities? I
12 mean, without all of the loan files from the debtors, you're
13 not going to be in a position, really, to move forward against
14 them, are you?

15 MR. DEFILIPPO: That's most likely the case, Your
16 Honor.

17 THE COURT: I mean, what's -- do you want to address
18 the issue of the burden or expense to the debtors if the action
19 proceeds against Ally Securities?

20 MR. DEFILIPPO: Yes, Your Honor. The debtors have
21 submitted a substantial amount of evidence to the effect that
22 Ally Securities has very limited documents. So there should be
23 no burden to the debtors if Ally Securities is required to
24 defend itself, because: a) it or its parent will pay its own
25 defense costs; and it should not be burdensome or expensive for

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1 it to produce its very limited documents. Nor should the
2 debtors' employees -- although we've learned today for the
3 first time, apparently that Ally Securities has no employees of
4 its own -- so I suppose either an employee of Ally Financial,
5 or another nondebtor, or perhaps an employee of the debtor, may
6 have to coordinate the production of Ally Securities documents.
7 But since the debtors are -- and Ally Securities is doing that
8 for other plaintiffs, it shouldn't be an additional burden of
9 consequence in our case.

10 The costs that Ally Securities may incur to defend
11 itself do not come out of the estate; do not threaten the
12 reorganization; nor do we think they in any way impair the
13 amounts available under the insurance coverage. Because it's
14 our understanding that the debtors have not yet -- nor has Ally
15 Financial -- consumed the entire twenty-five million dollar
16 self-insured retention under those policies. So until Ally
17 Financial pays twenty-five million out of its pocket, the
18 insurance carriers don't have to pay anything.

19 THE COURT: Mr. Haims argued that Ally Financial and
20 Ally Securities have a contractual indemnification right from
21 the debtors -- from ResCap. So why -- and take the twenty-five
22 million dollar self-insured retention, which has not -- no one
23 has argued that that's been hit yet. So why isn't the cost of
24 defending Ally Securities in your action a cost to the debtors,
25 in light of contractual indemnification?

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1 MR. DEFILIPPO: These are securities fraud cases. And
2 indemnity is disfavored in securities fraud cases, Your Honor.

3 THE COURT: If Ally Securities prevailed in your
4 action, wouldn't it be entitled to contractual indemnification?
5 The point about indemnification being disfavored, that's
6 certainly true. It may be impermissible depending on what the
7 theory of liability for Ally Securities is.

8 There's been some briefing -- I don't remember whether
9 it was in your brief or not -- but there's been some briefing
10 about the issue if it's a negligence-based claim, it's not
11 clear that indemnification would be prohibited. If it's a
12 scienter-based claim and liability is found, indemnification
13 may be prohibited. But if Ally Securities prevailed, wouldn't
14 it be entitled to contractual indemnification, if the contract
15 provided for it?

16 MR. DEFILIPPO: I haven't studied the contract that
17 closely, Your Honor. But let's assume it does for purposes of
18 this discussion. I think there are something like fifteen
19 billion dollars' worth of claims in these cases, plus
20 potentially another eight billion for the put-back claims, if
21 the settlement's approved. So the effect on this estate of
22 another few million dollars in indemnification claims by Ally
23 Securities is not going to be a game changer here.

24 THE COURT: What is your theory of liability against
25 Ally Securities?

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1 MR. DEFILIPPO: There are a number of provisions of
2 the Ohio Securities Act that --

3 THE COURT: Control person liability --

4 MR. DEFILIPPO: No, no.

5 THE COURT: -- under the Ohio Securities --

6 MR. DEFILIPPO: Direct liability of an underwriter,
7 Your Honor. I can cite you to those provisions, if you can
8 give me a second. But they're all in our complaint. But these
9 are --

10 THE COURT: Do you include 33 Act claims --

11 MR. DEFILIPPO: No, Your Honor.

12 THE COURT: Just the Ohio State --

13 MR. DEFILIPPO: Just Ohio Securities Act. And not
14 control person. Although we concede that the debtors' actions,
15 to the extent they were the creators of the prospectuses, have
16 an impact in our case. It is in no way a derivative claim.

17 THE COURT: Well, when you say "have an impact" in
18 your case, if you were to prevail, first of all, you would have
19 to show misrepresentations or omissions in the offering
20 documents, correct?

21 MR. DEFILIPPO: Yes, Your Honor.

22 THE COURT: And whether res judicata or collateral
23 estoppel applied against the debtors, I never understood that
24 strict res judicata or collateral estoppel was the test for
25 enjoining. I mean, wouldn't it have a significant impact on

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1 claims against the debtors if you established liability against
2 Ally Securities with a finding of misrepresentations or
3 omissions in the offering documents?

4 MR. DEFILIPPO: Your Honor, no such issue is going to
5 be presented to either the Court or the jury in that action
6 before the end of the stay period that we're talking about
7 here. The trial date is not until January of 2014. And the
8 debtors have represented that they're on a fast track to
9 confirmation. So in our view, the issue of the debtors'
10 liability to us and those like us will have to be decided by
11 Your Honor as part of either an estimation process or a claims
12 objection process, long before we go to trial in the Ohio case.

13 THE COURT: I think your colleague's trying to hand
14 you something.

15 MR. DEFILIPPO: Oh. Thank you. I --

16 THE COURT: Go ahead, if you --

17 MR. DEFILIPPO: No, I'm prepared to answer your next
18 question, Your Honor.

19 THE COURT: No. Is there any other point you want to
20 raise, at this point?

21 MR. DEFILIPPO: No, thank you, Your Honor.

22 THE COURT: Okay. Thank you very much.

23 MR. DEFILIPPO: Thank you.

24 THE COURT: Mr. Haims, do you want to respond?

25 MR. HAIMS: I have nothing further, Your Honor.

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1 THE COURT: I'm going to take a ten-minute recess and
2 come back and rule. I'm going to take a ten-minute recess and
3 then come back and rule, okay?

4 (Recess from 2:48 p.m. until 3:46 p.m.)

5 THE COURT: All right. Please be seated.

6 All right. The Court is going to rule. Pending
7 before the Court is the debtors' motion to extend the automatic
8 stay, or in the alternative, for injunctive relief enjoining
9 prosecution of certain pending litigation against debtors,
10 directors, and officers, and nondebtor corporate affiliates.
11 I'll refer to it as "the motion". It's at ECF docket number 4.
12 It's filed in the adversary proceeding styled Residential
13 Capital, LLC v. Allstate Insurance Co., et al. It's adversary
14 proceeding number 12-01671.

15 Through the motion, the debtor seeks and extension of
16 the automatic stay, to stay or enjoin the continued prosecution
17 of what was originally twenty-seven lawsuits against the
18 debtors, nondebtor affiliates, or directors and officers, all
19 of which are based on the debtors' issuance or sale of
20 mortgage-backed securities. Two of the twenty-seven cases were
21 dismissed before this injunction hearing was held. Of the
22 remaining twenty-five cases, the injunction motion was resolved
23 in all but one of the cases, with terms set forth or to be set
24 forth in stipulations presented to the Court.

25 In those twenty-five cases, the cases insofar as the

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1 debtor affiliates are concerned, are stayed until October 31,
2 2012. The stipulations provide or will provide that certain
3 motion practice in the underlying cases will be permitted to
4 proceed, as well as certain discovery, directed solely to the
5 nondebtor affiliates. To be clear on this point, the nondebtor
6 affiliates will only be required to produce documents that are
7 in their custody or possession. Documents in the possession of
8 the debtors will not have to be produced.

9 The only underlying case in which a resolution among
10 the parties has not been reached is the Western & Southern
11 case. And that is Western & Southern Life Insurance Co. v.
12 Residential Funding Co., LLC, et al., number A-110-5042 in the
13 Ohio Court of Common Pleas, in Hamilton County. Ally
14 Securities is the only remaining nondebtor affiliate that
15 remains a defendant in the underlying case. There are other
16 defendants remaining in the action, concerning other RMBS
17 transactions not involving ResCap.

18 For the reasons I will explain, the debtors' motion
19 will be granted on terms substantially similar to the terms of
20 the extensions of the stays to the other RMBS actions. And to
21 be clear, the stay does not apply with respect to other RMBS
22 transactions unrelated to the ResCap transactions.

23 During the hearing today, the Court admitted in
24 evidence testimony in the form of declarations offered by the
25 debtors. The declarants were present in court, but no parties

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1 requested cross-examination. Western & Southern offered three
2 documents in evidence that were admitted without objection.

3 Having heard and considered the evidence and arguments
4 of counsel, both in court and in their briefs, the Court now
5 rules as follows:

6 The debtors argue -- and the ruling is to grant the
7 stay on substantially the terms applied in the other matters.
8 The debtors argue that the Court should extend the automatic
9 stay to enjoin the continuation of the Western & Southern
10 action against Ally Securities with the exceptions noted for
11 the following reasons.

12 One, the debtors will be exposed to a significant risk
13 of collateral estoppel, stare decisis, and evidentiary
14 prejudice if the Western & Southern action is allowed to
15 continue. Two, the debtors will face very substantial and
16 burdensome discovery if the action continues. Three, the
17 debtors will face indemnification claims if the Western &
18 Southern action against Ally Securities is allowed to continue.
19 And four, property of the debtors' estates, namely shared
20 insurance policies, will be depleted if the Western & Southern
21 action against Ally Securities is allowed to continue. See In
22 re Quigley Co. Inc., 676 F.3d 45, 58 (2nd Cir. 2012).

23 Let me discuss the standard for issuance of a
24 preliminary injunction. Section 362(a) of the Bankruptcy Code
25 "provides for a broad stay of legal proceedings against the

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debtor that were or could have been commenced prior to the commencement of the bankruptcy case ...", 3 Collier on Bankruptcy, Paragraph 362.03 [3].

The automatic stay typically does not protect nondebtors. See 3 Collier on Bankruptcy, Section 362.03(3)(d), ("The stay of litigation does not protect nondebtor parties who may be subjected to litigation for transactions or events involving the debtor.")

But the Second Circuit and courts and in the Southern District have found certain limited circumstances where a bankruptcy court may extend a Section 362 stay to nondebtors. See, e.g., Queenie Ltd. v. Nygard International, 321 F.3d 282, 287 (2nd Cir. 2003), ("The automatic stay can apply to nondebtors, but normally does so only when a claim against the nondebtor will have an immediate adverse economic consequence for the debtor's estate.")

See also 3 Collier on Bankruptcy Section 362.03(3)(d), ("Although an action against third parties such as guarantors or codefendants is not stayed under Section 362(a), the court retains the power to enjoin the action if continuation of the action would interfere substantially with the debtor's reorganization.")

While the Second Circuit has not specified the precise situations when a bankruptcy court may extend the automatic stay to a third-party non debtor, courts in this district have

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determined that extending the automatic stay is appropriate in instances where: 1) the third party has a right of absolute indemnity from the debtor; 2) where a creditor's action against the third party would halt the nondebtor from contributing funds to the reorganization; and 3) where the action sought to be enjoined would "consume time and energy of the nondebtor that would otherwise be devoted to the reorganization effort." That's likewise a cite to Collier.

Courts find the power to extend the automatic stay to nondebtors in Section 105 of the Bankruptcy Code. See *In re United Healthcare Org.*, 210 B.R. 228, 232 (S.D.N.Y. 1997) ("The source of authority to issue such an injunction is 11 U.S.C. Section 105, which provides bankruptcy courts with general equity powers to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title'.")

Extending the automatic stay pursuant to Section 105 is essentially identical to granting an injunction, halting the actions of third-party nondebtors. Some courts, including this Court, in 2008, have found that Section 105(a) allows them to issue injunctions without complying "with the traditional requirements of Federal Rule of Civil Procedure 65", *In re the 1031 Tax Group, LLC*, 397 B.R. 670, 684 (Bankr. S.D.N.Y. 2008). See also *In re Adelphia Communications Corp.*, 298 B.R. 49, 54, (S.D.N.Y. 2003) ("The proof required to extend the stay is not

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1 as rigorous as that normally required for injunctions.")

2 Indeed, this Court has previously reasoned that all "a
3 bankruptcy court must find" to enjoin a claim against a
4 nondebtor under Section 105(a) was that the claim would
5 "threaten to thwart or frustrate the debtor's reorganization
6 efforts...and that the injunction is important for
7 reorganization.", In re the 1031 Tax Group LLC, 397 B.R. 684
8 (quoting Granite Partners, 194 B.R. 337).

9 In addition, "The courts have recognized that a stay
10 should be provided to codefendants when the claims against them
11 and the claims against the debtor are 'inextricably interwoven,
12 presenting common issues of law and fact which can be resolved
13 in one proceeding'," In re Ionosphere Clubs, Inc., 111 B.R.
14 423, 434 (Bankr. S.D.N.Y. 1990) (citing Fed Life Insurance Co.
15 v. First Financial Group, Inc. 3 B.R. 375, 376 (S.D.Tx. 1980).

16 At least two district judges in the Southern District
17 disagree with this approach. Judge Scheindlin examined and
18 rejected granting an injunction without a showing of the
19 traditional requirements needed for an injunction in In re
20 United Healthcare Organization. Judge Scheindlin observed that
21 Section 105 injunctions may only be issued "as necessary or
22 appropriate to carry out the provisions of this title", and
23 observed that Collier suggested employing an essentially
24 traditional standard when granting injunctive relief to third-
25 party nondebtors under Section 105. See 210 B.R. 234.

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1 Subsequent to In re United Health, Judge Castel noted
2 that injunctions under Section 105 may be used to extend the
3 automatic stay to nondebtors "where the action to be enjoined
4 is one that threatens the reorganization process." Hawaii
5 Structural Ironworkers Pension Trust Fund v. Calpine Corp.
6 06-cv-5358(PKC), 2006 WL 3755175*4 (S.D.N.Y. Dec. 20, 2006).

7 Judge Castel, however, agreed with Judge Scheindlin
8 that a more traditional standard of review should be employed
9 when granting injunctive relief to third parties. Judge Castel
10 stated that if an action would threaten reorganization process,
11 "the threat to the reorganization process must be imminent,
12 substantial, and irreparable" for a preliminary injunction to
13 be issued on behalf of a nondebtor; Id.

14 Judge Castel then noted that there must also be a
15 showing of: 1) a "reasonable likelihood of a successful
16 reorganization"; 2) a balance of the harms; and 3) a balancing
17 of the public interest at stake, before granting injunctive
18 relief under Section 105(a) to third parties.

19 Building upon these two decisions, Judge Scheindlin,
20 in a later opinion announced four factors a court must examine
21 when determining whether to extend the automatic stay to third
22 parties. 1) whether there's a likelihood of successful
23 reorganization; 2) whether there is an imminent, irreparable
24 harm to the estate in the absence of an injunction; 3) whether
25 the balance of harms tips in favor of the moving party; and

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1 4) whether the public interest weighs in favor of an
2 injunction. See Nevada Power Co. v. Calpine Corp., In re
3 Calpine Corp. 365 B.R. 401, 409 (S.D.N.Y. 2007).

4 Judge Gerber has recently employed the standard
5 articulated by Judge Scheindlin in the Lyondell bankruptcy.
6 See Lyondell Chemical Co. v. Centerpoint Energy Gas Services,
7 In re Lyondell Chemical Co. 402 B.R. 571, 587-89, Note 37
8 (Bankr. S.D.N.Y. 2009) (Observing that courts in this district
9 have held that "the usual grounds for injunctive relief ...
10 need not be shown for an injunction under Section 105(a)", but
11 employing the more traditional standard announced by Judge
12 Scheindlin.)

13 Collier concurs with this approach, noting that, "A
14 request for relief under Section 105 must meet traditional
15 requirements for an injunction," in noting the tests such as
16 the one articulated by Judge Scheindlin are "nothing more than
17 an evolution of the general requirements for a preliminary
18 injunction adapted for the bankruptcy context." 2 Collier on
19 Bankruptcy, paragraph 105.03(1) and (2).

20 Collier further observes that when extending the
21 automatic stay to third parties, "most courts have applied the
22 traditional test for the issuance of an injunction ...". 3
23 Collier on Bankruptcy, paragraph 362.04.

24 Let me deal with the Western & Southern objection.
25 Western & Southern, et al., are plaintiffs in an action pending

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1 in Ohio. On June 29th, 2011, Western & Southern filed the Ohio
2 action alleging that certain debtors, certain nondebtor
3 affiliates, and the unaffiliated underwriters, committed fraud,
4 violated the Ohio Securities Act, and committed other tortious
5 conduct in connection with the sale of 120 million dollars of
6 residential mortgage-backed securities to Western & Southern.

7 Western & Southern joined in the other objections, all
8 of which have been resolved in the motion. In December 2011,
9 defendants in the Ohio action filed motions to dismiss, arguing
10 that the claims were time barred and that Western & Southern
11 failed to plead actionable misrepresentations or the requisite
12 fraudulent intent. The officers -- the former officers who
13 were defendants also moved for dismissal based on lack of
14 personal jurisdiction.

15 On the defendants' motion, discovery was stayed in the
16 Ohio action pending a decision on the motions to dismiss. The
17 stay was granted in part because counsel for the debtors and
18 the nondebtor affiliates in the Ohio action assured the Court
19 that they would provide discovery immediately following a
20 ruling in the motions to dismiss. This is in the Fitzgerald
21 declaration, Exhibit 1 at page 15, lines 10 through 19.

22 On June 6, 2012, the motions to dismiss the Ohio
23 action as against the unaffiliated underwriters and nondebtor
24 affiliate, Ally Securities, were denied, except with respect to
25 claims barred by the statute of repose, provided for under the

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1 Ohio Securities Act. The officer defendants were also
2 dismissed without prejudice from the case, for lack of personal
3 jurisdiction. The Court did not rule on the motion as it
4 pertained to the debtors, because the claims against the
5 debtors were stayed.

6 The fact discovery deadline in the Ohio action is
7 April 4, 2013. Trial in the Ohio action is set to begin on
8 January 6, 2014. Western & Southern argues that any stay
9 should be conditioned on the nondebtor affiliates agreeing to
10 toll any applicable statute of limitations through the period
11 in which the stay is in place. Debtors' counsel has stated
12 that he does not have authority to agree to toll the statute of
13 limitations on behalf of these former officers or directors.

14 In granting the stay, the Court determines, and any
15 order prepared embodying the ruling shall provide, that the
16 stay is effective as to the former officers and directors only
17 if they agree to toll all applicable statutes of limitations
18 from the period from today until the stay expires.

19 All right. Let me provide my analysis of the claims
20 asserted in the Ohio action and the reasons for the stay.
21 Courts may extend the automatic stay to nondebtor litigants
22 where "there is such identity between the debtor and third-
23 party defendant that the debtor may be said to be the real
24 party defendant, in that a judgment against third-party
25 defendant will, in effect, be a judgment or a finding against

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1 the debtor." A.H. Robbins Co. v. -- I can't pronounce it --
2 Piccinin, 788 F.2d 994, 999 (4th Cir. 1986).

3 However, when a party holds an independent direct
4 claim against a nondebtor for violating the federal securities
5 laws, "there is no compelling basis by which a court must
6 extend the automatic stay provisions of Section 362 to the
7 nondebtor codefendants." See In re First Century Financial
8 Corp. 238 B.R. 18 (Bankr. E.D.N.Y. 1999).

9 That principle is limited, however, where establishing
10 liability against the nondebtors hinges on establishing facts
11 that would likewise establish liability against the debtors.
12 And that is, in fact, the case here. In the Western & Southern
13 action, all the claims essentially require the plaintiffs to
14 establish that the RMBS offering documents contained material
15 misstatements or omissions of fact. Such a showing, of course,
16 would be required to establish liability on the part of the
17 debtors if the action was to proceed against them.

18 Here, the claims against Ally Securities are based on
19 the same nucleus of facts as the claims against the debtors.
20 Thus, the only way for the plaintiffs to prove liability
21 against Ally Securities is to make a prima facie case that the
22 debtors violated securities laws too. Any decisions and
23 evidence generated would thus be later used against the
24 debtors, whether in the underlying lawsuits or in claims the
25 Western & Southern plaintiffs make against the debtors' estate

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1 in these Chapter 11 cases. See *McHale v. Alvarez*, In re the
2 1031 Tax Group LLC, 397 B.R. 670, 685 (Bankr. S.D.N.Y. 2008)
3 (Staying lawsuits against debtors' former employees that could
4 lead to respondent superior liability for debtors during the
5 reorganization.)

6 In re *Johns Manville*, 26 B.R. 420, 426 (Bankr.
7 S.D.N.Y. 1983) (Staying securities claims against the debtor's
8 directors and officers where claims were "in reality,
9 derivative of identical claims" that were or could be brought
10 against the debtors.)

11 The Western & Southern plaintiffs in the underlying
12 case have argued that the similarity in claims against the
13 debtors and the nondebtors will not result in stare decisis or
14 evidentiary prejudice. In actuality, the debtors will have to
15 live with any decision in the case that was resolved as to the
16 nondebtor defendants. See, e.g., *Johns Manville*, 26 B.R. 429
17 ("Even if the debtor is not so bound by collateral estoppel, it
18 may be disadvantaged in subsequent suits.")

19 Although the debtors will have the opportunity to
20 raise independent defenses to their own liability, the debtors
21 will have to live -- will have little or no chance to unring
22 the bell following a decision that could be used against them.
23 If the Court does not extend the stay in these cases, the
24 debtors will be faced with a choice of sitting on the sidelines
25 and being stuck with rulings on issues they did not litigate,

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1 or be forced to litigate, the very thing the automatic stay is
2 supposed to prevent. See Hawaii Structural, 2006 WL 3755175 *5
3 ("A prudent debtor would devote managerial and financial
4 resources to assisting in the defense of its affiliates,
5 because of the potential impact upon a claim or suit against
6 the debtor."). In re Calpine Corp. 365 B.R. 401, 412 (S.D.N.Y.
7 2007) (This is especially so in situations where the debtor's
8 liability has not yet been established and where the nondebtor
9 affiliate has the ability to assert all of the debtor's factual
10 and legal defenses to liability.)

11 Indemnification rights. Additionally, the debtors
12 have established that Ally Securities may be entitled to a
13 contractual indemnification from the debtors. Where a
14 nondebtor party is entitled to absolute indemnity by the debtor
15 on account of any judgment that might result against them in
16 the case, extensions of the automatic stay may be appropriate.
17 A.H. Robbins 788 F.2d 989.

18 Here, the operating agreements apply to the underlying
19 actions, including the plaintiff -- the Western & Southern
20 lawsuit. The operating agreements require the debtors to
21 indemnify the nondebtor corporate affiliates for "losses
22 related to" the debtors' "business and operations". See the
23 Whitlinger declaration, Exhibit B at sections 1 and 3(c).

24 Because a fundamental part of the debtors' business
25 strategy consists of securitizing and selling mortgage loans

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1 that they purchase or originate, the debtors thus are obligated
2 to indemnify the nondebtor corporate affiliates for losses
3 stemming from the debtors' issuance or sale of mortgage-backed
4 securities. While indemnifications for specific judgments at
5 this time is still contingent, the debtors are still obligated
6 to pay defense costs for the indemnitees. Whitlinger
7 declaration, Exhibit A, section 18(d)(i).

8 While such obligations will become unsecured claims in
9 bankruptcy pursuant to Section 502, they nonetheless increase
10 the debtors' total liabilities and detract from the overall
11 creditor recovery. While complete indemnification of liability
12 for violations of federal or state securities laws may be
13 contrary to public policy, it is unclear whether a defendant
14 held liable in a negligence-based claim may be entitled to
15 indemnification. And of course, if the defendant prevails in
16 the underlying action, it would appear that it would be
17 entitled to whatever contractual indemnification is available.

18 It appears at this stage of the proceedings, that the
19 debtors have established by a preponderance of the evidence,
20 that Ally Securities is entitled to contractual indemnification
21 unless it is ultimately determined to be liable in the
22 underlying action. Indemnification will further reduce assets
23 available for distribution from the debtors' estates.

24 We discussed the discovery burdens. The most
25 significant factor favoring extending the stay in this case is

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1 the substantial discovery burden and expense the debtors would
2 face if the Western & Southern action goes forward against Ally
3 Securities. The debtors put forward evidence in Mr. Lipps'
4 declaration setting forth in specific detail the cost and
5 burden of discovery in these lawsuits. See the Lipps
6 declaration, paragraphs 70 through 78.

7 Western & Southern has never challenged the statements
8 in Mr. Lipps' declaration, either in deposition or in their
9 opposition. Western & Southern offers nothing more than pure
10 conjecture that discovery in their case will not be burdensome.

11 The debtors have provided specific examples of cases
12 that involved a small number of securitizations, but still
13 produced millions of pages in discovery and upwards of eighty
14 days' worth of depositions from the debtors' current and former
15 employees. See the Lipps declaration, paragraphs 28 and 29.

16 Any prospective discovery will also burden current and
17 former employees of the debtors. "It matters little that some
18 of the individual defendants are no longer affiliated with the
19 debtor." Because the ultimate discovery burden falls on
20 current employees who are critical to restructuring. See
21 Hawaii Structural, 2006 WL 3755175 *5,6.

22 The debtors have adequately shown the negative impact
23 of continued litigation on the debtors' key employees. See the
24 supplemental Lipps declaration, at paragraphs 31 through 33.

25 We'll briefly discuss proceeds of insurance policies

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1 covering both the debtors and the nondebtor defendants. The
2 debtors further assert that the Western & Southern action
3 impacts property of the estate in the E&O policy, a single line
4 of coverage applicable to just one of the several years
5 relevant to the Western & Southern action, with a twenty-five
6 million dollar retention or deductible. The E&O policy has
7 been introduced into evidence. It provides entity coverage and
8 is a wasting policy, meaning that every dollar spent of policy
9 proceeds reduces the amount available for claims by the
10 debtors.

11 According to the debtors, the primary E&O insurer,
12 Chubb, issued a letter setting forth its preliminary coverage
13 position that dispenses with both of these arguments. As to
14 the policy period, Chubb's coverage letter makes clear that
15 "pursuant to Section 7(a) of the relevant policies, all loss
16 associated with the MBS actions shall be deemed one loss and
17 such loss shall be deemed to have originated during the '07-'08
18 BPL policy." That's the policy attached to the Whitlinger
19 declaration.

20 Chubb's coverage letter also makes clear that the
21 Western & Southern action claims fall within the scope of the
22 insurance policy. The coverage letter states that "the MBS
23 actions trigger cover under the broker-dealer services
24 liability clause of the '07-'08 BPL policy, because they are
25 civil proceedings brought by or on behalf of a broker-dealer

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customer against an insured for a broker-dealer wrongful act."

The coverage letter also notes that the lawsuit filed by Western & Southern has been tendered and were included in the MBS actions covered by the E&O policy.

The Court's conclusion. The Court grants the motion -- the debtors' motion to extend the stay on essentially the terms agreed upon in the stipulated extensions of the stay in the other cases. The stay shall remain in place until October 31, 2012, with all parties retaining all rights to seek to extend or terminate the stay at that time. Discovery may proceed in the Western & Southern action only as to documents in the possession of Ally Securities.

The parties shall draft and submit a proposed order consistent with this oral bench opinion. In the event the parties cannot agree on the terms of the order, they may arrange a telephone conference with the Court to resolve any remaining issues.

That is the decision of the Court.

IN UNISON: Thank you, Your Honor.

THE COURT: Mr. Haims, is there anything else for me to take up today?

MR. HAIMS: No, Your Honor.

THE COURT: So you have some work to do with respect to the additional matters that -- as to which you were able to resolve today by stipulation. And you'll have to work with

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counsel for Western & Southern to craft an appropriate order
consistent with my ruling.

MR. HAIMS: We'll do that, Your Honor.

THE COURT: Okay?

MR. HAIMS: Thank you.

THE COURT: All right. Thank you very much,
everybody.

(Whereupon these proceedings were concluded at 4:14 PM)